92-551

No.

Supreme Court, U.S.
FILED
SEP 25 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

DOUGLAS LETTER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JOHN W. HEROLD
Associate General Counsel

HOWARD M. SCHMELTZER
Assistant General Counsel

BART SHAPIRO
Trial Attorney
Department of Housing and Urban Development
Washington, D.C. 20410

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057, violates the Due Process Clause of the Fifth Amendment by abrogating vested contract rights.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties to the proceedings in the courts below: the United States Department of Housing and Urban Development; the United States; Monroe Associates, a Limited Partnership; Brentwood, a Limited Partnership; Campbell Courts Associates, a Partnership; Cheney Gardens Limited Partnership, a Limited Partnership; Bitterroot Manor, a Limited Partnership; Crown Plaza Associates, a Limited Partnership; Crestwood Inn, Inc.; Dakota Meadows Associated, a Limited Partnership; Douglas Grove, a Limited Partnership; Golden Valley Homes Associates, a Partnership; Gary D. Erickson; Bothell Landing Associates, a Partnership; Howard O. Wilson and Donita E. Wilson; Moses Lake Estates, a Limited Partnership; Howard Street Association, a Limited Partnership; Magnuson Group, a Joint Venture; Marion Court Associates, a Partnership; Meadowood Development Co., LTD.; Rainier Vista Associates, a Limited Partnership; Rawlins & Rex, a Partnership; Gordon Henrickson; Olympic Village, LTD., a Limited Partnership; Robert & Ingrid Becker, husband and wife; Park West Associates, a Limited Partnership; Sound View Associates, a Partnership; South Bayview Associates, a Partnership; Sundowner Associates, a Limited Partnership; Wapato Gardens, a Limited Partnership; Westwood Associated, a Partnership; Willapa Landing Associates, a Limited Partnership; Axelrod Marymoor Associates, a Limited Partnership; Security Rental Properties, a Partnership; Park West Associates, a Limited Partnership; Riverwood Manor Associates, a Partnership; Wright Park Associates, a Limited Partnership; Yakima Gardens, a Limited Partnership; Michael and Patti Carpinito,

husband and wife; Dan and Carol Carpinito, husband and wife; Vista Lee Rosa Co., a Partnership; Terra Bella Development Co., a Partnership; Goldsborough Creek Associates, a Limited Partnership; Craigmont Associates, a Limited Partnership; Fernhill Terrace Associates, a General Partnership; Meriwether Village, a General Partnership; COHO Park, a General Partnership; Lacey Housing, Inc., a General Partnership; Marvin L. Koh, Audrey S. Koh, Barbara E. Koh, Christopher C. Koh and David A. Koh; Narrows Apartments Associates; Hotel Oakland Associates, a Limited Partnership; Emeric Goodman Associates, a Limited Partnership; Acacia Villa; Alicia Park Apartments; Amerige Villa; and Antelope Valley.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provision involved	2
Statement	2
Reasons for granting the petition	11
Conclusion	24
Appendix A	1a
Appendix B	15a
Appendix C	31a
Appendix D	32a
Appendix E	40a
Appendix F	61a
Appendix G	64a
Appendix H	67a

TABLE OF AUTHORITIES

Cases:

Battaglia v. *General Motors Corp.*, 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948)	18
Beck Park Apartments v. *United States Dep't of Housing & Urban Dev.*, 695 F.2d 366 (9th Cir. 1982)	15
Board of Regents v. *Roth*, 408 U.S. 564 (1972)	12
Bowen v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41 (1986)	19, 21
Carmichaels Arbors Assocs. v. *United States*, 789 F. Supp. 683 (W.D. Pa. 1992), appeal pending, No. 92-3326 (3d Cir.)	12
Central Elec. Coop., Inc. v. *Bonneville Power Admin*, 835 F.2d 199 (9th Cir. 1987)	15
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	14

Cases—Continued: Page

Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) 15
Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) 18
Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947) 14
Federal Housing Admin. v. *The Darlington, Inc.*, 358 U.S. 84 (1958) 15, 20
General Motors Corp. v. *Romein*, 112 S. Ct. 1105 (1992) 18
Graham and Foster v. *Goodcell*, 282 U.S. 409 (1931) 18
Lynch v. *United States*, 292 U.S. 571 (1934) 10, 20, 21
Martin v. *Occupation Safety & Health Review Comm'n*, 111 S. Ct. 1171 (1990) 17
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 19
National Leased Housing Ass'n v. *United States*, 22 Cl. Ct. 649 (1991), appeal pending, No. 92-5064 (Fed. Cir.) 12
Office of Personnel Management v. *Richmond*, 496 U.S. 414 (1990) 14
Opdyke Investment Co. v. *Detroit*, 883 F.2d 1265 (6th Cir. 1989) 18
Pension Benefit Guaranty Corp. v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 18
Perry v. *United States*, 294 U.S. 330 (1935) 10, 20, 21
Rainier View Assocs. v. *United States Dep't of Housing & Urban Dev.*, 848 F.2d 988 (9th Cir. 1988), cert. denied, 490 U.S. 1066 (1989) 4, 6, 7, 15, 16
Robertson v. *Seattle Audubon Society*, 112 S. Ct. 1407 (1992) 12
Sheridan Square Partnership v. *United States*, 761 F. Supp. 738 (D. Colo. 1991) 12
Udall v. *Tallman*, 380 U.S. 1 (1965) 17
United States v. *Rutherford*, 442 U.S. 544 (1979) 18
United States v. *Sperry Corp.*, 493 U.S. 52 (1989) 18
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 18

Constitution, statutes and regulations: Page

U.S. Const. Amend. V (Due Process Clause) 2, 10, 12
Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987:
§ 801, 103 Stat. 2057-2059 ..... 2, 10, 11, 12, 17, 19, 20, 21, 22, 23
§ 801(a), 103 Stat. 2057-2058 ..... 8, 9
§ 801(c), 103 Stat. 2058 9
§ 801(d), 103 Stat. 2058-2059 9
§ 801(a)(2)(B), 103 Stat. 2058 9
Housing Act of 1937, 42 U.S.C. *et seq.*:
§ 3(a), 42 U.S.C. 1437a(a) 3
§ 8, 42 U.S.C. 1437f ..... *passim*
§ 8(b), 42 U.S.C. 1437f(b) 3
§ 8(c), 42 U.S.C. 1437f(c) 3
§ 8(c), 42 U.S.C. 1437f(c) note (Supp. II 1990) 8
§ 8(c)(1), 42 U.S.C. 1437f(c)(1) 3, 16
§ 8(c)(2), 42 U.S.C. 1437f(c)(2) 3
§ 8(c),2)(A), 42 U.S.C. 1437f(c)(2)(A) 3, 6, 14, 15, 16, 17
§ 8(c)(2)(C), 42 U.S.C. 1437f(c)(2)(C) (1982) 3, 5, 16, 17
§ 8(c)(2)(C), 42 U.S.C. 1437f(c)(2)(C) (Supp. II 1990) 8, 14
Housing and Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1850 (1988) 15
§ 142(c)(2)(A), 101 Stat. 1850 4
§ 142(c)(2)(B), 101 Stat. 1850 ..... 7, 15
24 C.F.R.:
Section 880.103 16
Section 880.110(d) 17
Section 880.204 16
Section 880.609(c) 5, 17

Miscellaneous:	Page
135 Cong. Rec. (daily ed. Nov. 21, 1989):	
p. H9,686	22
p. S16,594	22
p. S16,600	8
p. S16,607	22
pp. S16,608-S16,609	8, 22
40 Fed. Reg. 18,687 (1975)	17
44 Fed. Reg. 59,428 (1979)	17
52 Fed. Reg. 9478-9491 (1987)	5
53 Fed. Reg. 14,954 (1988)	16
56 Fed. Reg. 59,996 (1991)	8
S. Rep. No. 693, 93d Cong., 2d Sess. (1974)	19

In the Supreme Court of the United States

OCTOBER TERM, 1992

No.

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Jack F. Kemp, Secretary of the United States Department of Housing and Urban Development, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-14a, is reported at 955 F.2d 1382. The opinion of the district court in the *Alpine Ridge* case, App., *infra*, 15a-30a, is reported at 764 F. Supp. 1393; a supplemental order in that case, App., *infra*, 32a-39a, is unreported. The opinion of the district court in the *Acacia Village* case, App., *infra*, 40a-60a, is reported

at 774 F. Supp. 1240; the final judgment in that case, App., *infra*, 61a-63a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. A petition for rehearing was denied on May 29, 1992. App., *infra*, 64a-66a. On August 18, 1992, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including September 26, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057 (codified at 42 U.S.C. 1437f (c)(2)(C) (Supp. II 1990) and 42 U.S.C. 1437f(c) note (Supp. II 1990)), is set forth in an appendix. App., *infra*, 67a-71a.

STATEMENT

In this case, the court of appeals declared an Act of Congress unconstitutional. The court held that Section 801 of the Department of Housing and Urban Development Reform Act of 1989 abrogates contracts between the government and private parties and therefore violates the Due Process Clause of the Fifth Amendment.

1. *Background.* In 1974, Congress added the Section 8 program to the Housing Act of 1937 (Act). See 42 U.S.C. 1437f. The Section 8 program provides federally subsidized housing to millions of low income tenants by authorizing the payment of rent subsidies. The tenant's rental obligation is based on his ability to pay, while the federal government makes "assist-

ance payments" to the project owner to bring total rental income up to the prevailing market level. See generally 42 U.S.C. 1437a(a), 1437f(b) and (c).

Under the Section 8 program, the Secretary of the United States Department of Housing and Urban Development (HUD) enters into standard form long-term contracts with project developers and landlords. These are known as "housing assistance payment contracts" or HAP contracts. The framework for those contracts is governed by statute. Under the statute, a maximum monthly rent is established for each dwelling unit, which (subject to exceptions not relevant here) cannot exceed a "fair market rental[]." 42 U.S.C. 1437f(c)(1). The statute, as originally enacted, also provided for adjustments in the maximum monthly rent in accordance with the following provisions:

> (A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.
>
> * * * * *
>
> (C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

42 U.S.C. 1437f(c)(2)(A) and (C) (1982).[1] The HAP contracts implement those provisions by (1)

[1] In 1988, Congress amended Section 8(c)(2) of the Act, *inter alia*, by deleting the phrase "assisted units and compar-

providing that adjustment of rents will be made on the basis of a reasonable formula, and (2) stipulating as an "overall limitation" that, notwithstanding any other provision of the contract, adjustments shall not produce material differences between the rents at comparable assisted and unassisted units.

As to the formula-based adjustment, the HAP contract states:

> b. *Automatic Annual Adjustments*
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register * * *.
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

HAP Contract, § 1.9b.[2] The Automatic Annual Adjustment Factors (Adjustment Factors) are generated by HUD's Office of Economic Affairs, which uses the Consumer Price Index and the Bureau of the Census American Housing Surveys to produce a percentage by which the rent will be adjusted. HUD establishes different Adjustment Factors to cover broad regions of the country. See, *e.g.*, 52 Fed. Reg. 9478-9491 (1987) (Adjustment Factors established for four census regions, Alaska and Hawaii, and 72 metropolitan areas).

As to the cap on the formula-based adjustments (required by 49 U.S.C. 1437f(c)(2)(C)), the HAP contract states:

> d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government. * * *

HAP Contract, § 1.9d. HUD regulations also reflect the Secretary's determination to make adjustments in rents based on the Adjustment Factors, subject to an overall cap that adjustments shall not produce a material difference from rents at comparable unassisted units, as determined by HUD. See 24 C.F.R. 880.609(c).

2. *The* Rainier View *decision.* In the early 1980s, HUD became concerned that application of the Adjustment Factors was yielding rents in some instances

---

able unassisted units" and replacing it with the phrase "assisted and unassisted units of similar quality and age in the same market area." Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2)(A), 101 Stat. 1850 (1988), codified at 42 U.S.C. 1437f(c)(2)(C).

[2] The relevant provisions of the HAP contract are quoted in *Rainier View Assocs.* v. *United States Dep't of Housing & Urban Dev.*, 848 F.2d 988, 989-990 (9th Cir. 1988) (per curiam), cert. denied, 490 U.S. 1066 (1989). Some HAP contracts contain identical language with different section numbers. More recent HAP contracts provide that, on the owner's request, contract rents will be adjusted in accordance with pertinent HUD regulations. See HUD Form 52522D (8-80). These differences are not material for purposes of this petition.

that were unduly high in comparison with comparable unassisted units. Accordingly, to comply with the statutory directive to avoid excessive rents and in conformity with the overall limitation provision of the HAP contracts, HUD began to undertake, with respect to individual projects, "comparability studies" as a means of determining the rents charged in comparable unassisted units. Those studies would identify three to five comparable projects in a relevant geographic area and would then conduct appraisals to see whether the rents at those projects were materially different from those at the Section 8 project. If the differences were material, the rents determined through the comparability studies would serve as a "cap" to the rental increase produced by the more general Adjustment Factors.

HUD's determination to use comparability studies as a cap to increases produced under the Adjustment Factors led to litigation. In particular, Section 8 project owners challenged HUD's use of comparability studies to limit increases under the Adjustment Factors, claiming that their contracts entitled them to the full increases produced by the Adjustment Factors. In *Rainier View Assocs.* v. *United States Dep't of Housing & Urban Dev.*, 848 F.2d 988 (9th Cir. 1988) (per curiam), cert. denied, 490 U.S. 1066 (1989), the court of appeals rejected HUD's interpretation of the law as well as the plain language of the contracts, and concluded that HUD could not use comparability studies to limit formula-based rent increases.

The *Rainier View* court stated that Section 8(c)(2)(A) allows HUD to choose *either* the market-survey *or* the reasonable-formula method for adjusting rents, and that "[t]he overall limitation provi-

sion * * * is clearly a limitation on the calculation of the formula used to adjust rents, not an independent basis for making annual rent adjustments." 848 F.2d at 991. The court found that HUD, having elected to use a reasonable formula in the HAP contracts, could not go back on that choice by applying a market survey cap through the comparability studies. In the court's view, that approach would nullify the formula method that the statute authorizes and that HUD elected. The court also believed that HUD's regulations took the view that the "overall limitation" had to be integrated into the adjustment formula, not superimposed on top of it. *Ibid.*

Shortly before the panel ruled in *Rainier View*, Congress amended Section 8 in a manner that confirmed the permissibility of HUD's use of comparability studies to cap Adjustment Factor increases.[3] Although the court of appeals was advised of that amendment, it denied rehearing. This Court denied the government's petition for a writ of certiorari. 490 U.S. 1066 (1989).

3. *The statute at issue in this case.* Following *Rainier View*, disputes continued to arise regarding the use of comparability studies. In December 1989, Congress enacted the provision at issue in this case with the goal of putting an end to the continued

---

[3] It did so by adding to Section 8(c)(2)(C) the following sentence: "If the Secretary * * * does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied." Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2)(B), 101 Stat. 1850 (1988).

controversy.[4] The Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, § 801, 103 Stat. 2057-2059 (codified at 42 U.S.C. 1437f(c)(2)(C) (Supp. II 1990) and 42 U.S.C. 1437f(c) note (Supp. II 1990)), prescribes new procedures for calculating rent adjustments, both retrospectively and prospectively.

As to rental increases from 1980 until the date when HUD promulgates new regulations,[5] Section 801(a), 103 Stat. 2057-2058, provides for retrospective rental increases higher than those HUD would have permitted under its comparability limitation, but lower than those called for by the full formula adjustment standing alone; this was designed to correct what Congress perceived to be HUD's maladministration of comparability studies in the past. Section 801(a) calls for HUD to adjust rents by applying the Adjustment Factors to the portion of the contract

[4] The Senate Banking, Housing, and Urban Affairs Committee explained that "[t]he Committee did not * * * share the Ninth Circuit's interpretation of HUD's authority to perform individualized comparability studies. Clearly, a market reality test must be an integral component of the Section 8 program to ensure that HUD pays reasonable rents." 135 Cong. Rec. S16,600 (daily ed. Nov. 21, 1989). Accordingly, as one of the sponsors stated, the new bill sought to "ensure a reasonable rate of return to the owners while effectuating the original congressional objective * * * of avoiding excessive rents and rates of return for section 8 projects"; the amendment was meant to "resolve past and present controversies between [HUD] and project owners," as well as "eliminate uncertainty and contribute to smooth and effective operation of the section 8 program." *Id.* at S16,608-S16,609 (daily ed. Nov. 21, 1989) (remarks of Sen. D'Amato).

[5] Such regulations have now been promulgated. 56 Fed. Reg. 59,996 (1991).

rent other than that used for debt service, or by multiplying the contract rent by 30% of the Adjustment Factors, whichever yields the higher payment to the owner.[6]

For the future, Section 801(c) requires HUD to promulgate "regulations for conducting comparability studies for projects where the Secretary has reason to believe that the application of the formula adjustments * * * would result in such material differences" between assisted and unassisted units and to use those studies to establish a modified annual adjustment factor. 103 Stat. 2058. The statute describes the methodology to be used by the Secretary in conducting comparability studies. It also stipulates that if a modified adjustment factor cannot be established or fails to eliminate material differences between rents at similar assisted and unassisted units, the Secretary may apply another methodology to achieve that end. *Ibid.*

Finally, Section 801(d) provides that, at a project owner's request, HUD will make a one-time determination of the contract rent as a basis for future rent adjustments. 103 Stat. 2058-2059. Under that provision, the contract rent will be the greater of (a) the currently approved contract rent, or (b) the contract rent as calculated under the retroactive provisions in Section 801(a).

4. *The present controversy.* Respondents are developers and owners of Section 8 projects. They brought challenges to the constitutionality of Section 801, contending that their HAP contracts, as con-

[6] Section 801(a) was expressly made inapplicable to projects covered by a prior final judgment in litigation over the authority of the Secretary to use comparability studies to limit rental adjustments. § 801(a)(2)(B), 103 Stat. 2058.

strued in *Rainier View*, entitled them to rent increases in accordance with the Adjustment Factors and that Section 801's alteration of those contracts violates the Due Process Clause of the Fifth Amendment. The United States District Courts for the Western District of Washington and the Central District of California, in separate cases, declared Section 801 unconstitutional, App., *infra*, 15a-31a, 40a-63a, and the government appealed.

The court of appeals consolidated the two cases and affirmed. App., *infra*, 1a-14a. The court first held that it was bound by *Rainier View*'s ruling that comparability studies could not be used under the HAP contracts to limit rent increases under the Adjustment Factors, notwithstanding the fact that amendments to the Section 8 program revealed that Congress had intended comparability studies to serve as a cap to such rent increases. App., *infra*, 6a-8a.

The court then determined that the owners' contractual rights to rent increases under the Adjustment Factors were "vested" property rights. App., *infra*, 8a-12a. The court relied on the conclusion of the *Rainier View* court that "HUD *explicitly* limited its statutory options by choosing the formula methodology for adjusting rents and bound itself to that choice in the contracts with the owners." *Id.* at 12a. The court did not independently defend the *Rainier View* court's reading of the "overall limitation" provision.

Finally, relying on *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935), the court of appeals found that Section 801 unconstitutionally modifies respondents' vested property rights because Congress, as the court saw it, had acted solely in order to save money payable by the government under the HAP contracts. App., *infra*, 12a-14a. The court rejected the contention that Section 801 clarified that respondents are wrong in claiming entitlement to rent increases based on the Adjustment Factors free from the "overall limitation" cap. It also dismissed out of hand the argument that Section 801 is constitutionally valid as a measure designed to resolve the continued dispute over the proper method for adjusting rent increases in the Section 8 program. The court therefore concluded that Section 801 "unconstitutionally abrogates the owners' vested property rights in violation of the fifth amendment." App., *infra*, 14a.

REASONS FOR GRANTING THE PETITION

The court of appeals has struck down Section 801 of the Department of Housing and Urban Development Reform Act of 1989 on the ground that it abrogates vested contract rights protected by the Due Process Clause. The decision invalidates a key provision in a substantial federal program designed to provide housing for low-income tenants. If allowed to stand, the decision will require HUD to pay many millions of dollars in extra federal subsidies to Section 8 project owners. Because the court's decision rests on a deeply flawed construction of the HAP contracts, misapplies this Court's due process jurisprudence, and threatens to inflict widespread harm on a major social welfare program, this Court's review is warranted.

1. The Ninth Circuit concluded that Section 801 impairs respondents' "vested" property rights in their HAP contracts. That analysis began with the assumption, derived from that court's decision in *Rainier View*, that the HAP contracts guarantee Section 8 project owners the unqualified right to rent increases as computed under the Adjustment Factors. The court then found that Section 801's

modification of that "right" substantially impairs respondents' property. The Due Process Clause of the Fifth Amendment protects against deprivations of "life, liberty, or property without due process of law," U.S. Const. Amend. V, and contractual rights may constitute property rights. But Section 801 does not *impair* respondents' contract rights unless *Rainier View*'s reading of those contracts is correct. See *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). "If the claimed right cannot be found in the contract, [respondents] would have no property right on which to base standing to attack the constitutionality of section 801." *Carmichaels Arbors Assocs.* v. *United States*, 789 F. Supp. 683, 687 (W.D. Pa. 1992), appeal stayed pending resolution of this case, No. 92-3326 (3d Cir.).

The threshold question is therefore whether *Rainier View*'s interpretation of the HAP contracts is correct. If the Ninth Circuit erred in its contractual holding, its constitutional analysis was unnecessary. Cf. *Robertson* v. *Seattle Audubon Society*, 112 S. Ct. 1407, 1414 (1992). For several reasons, *Rainier View*'s holding is untenable.[7]

---

[7] The three courts outside of the Ninth Circuit that have considered constitutional attacks against Section 801 have each concluded that *Rainier View* is wrong. Those courts have found that project owners do *not* have a right to the full formula adjustment regardless of the result of a comparability study. Accordingly, those courts have held Section 801 has not deprived landlords of constitutionally protected contract rights. *Carmichaels Arbors Assocs.* v. *United States*, *supra*; *Sheridan Square Partnership* v. *United States*, 761 F. Supp. 738 (D. Colo. 1991); *National Leased Housing Ass'n* v. *United States*, 22 Cl. Ct. 649 (1991), appeal pending, No. 92-5064 (Fed. Cir.).

a. The unequivocal language of the HAP contracts establishes that Section 8 project owners have no right to rent increases under the Adjustment-Factors formula when that formula will produce rents that exceed rents at comparable unassisted projects. Section 1.9b of the HAP contract states that HUD will publish annual adjustment factors, and will apply them to contract rents. Section 1.9d, however, subjects that procedure to what is explicitly termed an "*overall limitation*"—"Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government * * *." That language clearly states that the requirement of avoiding material differences takes precedence over all other contractual provisions: it is an "overall limitation."

To enforce the mandate of Section 1.9d, HUD determined to conduct targeted "comparability studies." The Adjustment Factors, while adjusting rents by a presumptively reasonable amount, cannot assure that in each specific case the formula-based rent increases will not result in material differences between assisted and comparable unassisted units. Accordingly, when it suspected that the Adjustment-Factor increases might be excessive, HUD appraised rents at three to five comparable projects in a relevant geographic area. If that effort revealed no material differences between the assisted and unassisted projects, HUD applied the Adjustment Factors to adjust rents; if, however, material differences were discovered, HUD limited the rent increases so that they did not materially exceed rents at comparable unassisted proj-

ects. That procedure is clearly authorized by the "overall limitation" provision of the HAP contract.

The HAP contract must be construed in light of the Housing Act of 1937, for HUD had no authority to enter into agreements that were not authorized by the statute. *Office of Personnel Management* v. *Richmond*, 496 U.S. 414 (1990); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947). The statute requires the Secretary to ensure comparability; it lends no support to the position that the Adjustment Factors can be mechanically applied when to do so would yield excessive rents.[8] If the Secretary *had* entered into contracts that allowed that result, those contracts would have been beyond his authority.

Because the statute gives the Secretary discretion about *how* to fulfill the requirement that material differences be avoided, the Secretary has the authority to adopt reasonable interpretations of that requirement. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). And because the HAP contract incorporates the statutory requirement that material differences between assisted and comparable unassisted projects be avoided, the construction of the contract is informed by the

[8] The Act states that contracts in the Section 8 program shall provide for rental adjustments "to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 42 U.S.C. 1437f(c)(2)(A). It adds the caveat, however, that rental adjustments "shall not result in material differences between the rents charged for assisted units and unassisted units of similar quality and age in the same market area, as determined by the Secretary." 42 U.S.C. 1437f(c)(2)(C).

Secretary's interpretation of the statute.[9] Not only is the Secretary's interpretation in this case reasonable and consistent with the statute, it was ratified by Congress's action in Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2)(B), 101 Stat. 1850 (1988). See note 3, *supra*. A statutory amendment authorizing continuation of the agency's approach is "virtually conclusive" in interpreting the statutory scheme. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986); *Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 91-92 (1958).

b. The *Rainier View* court concluded that HUD is prohibited from using comparability studies as an independent cap on the Adjustment Factors. The court stated that if the comparability studies reveal that the Adjustment Factors are inaccurate in an individual case, HUD is limited to revising the formulas that produce the Adjustment Factors. 848 F.2d at 991. That holding misinterprets the "overall limitation" provision of the HAP contract and frustrates the Act's requirement of prevailing market-level rents.

The premise of *Rainier View* is that Section 8 (c)(2)(A) requires HUD to adjust rents based on *either* a market survey method *or* a formula method, and that having elected to use the formula method, HUD could not conduct comparability studies without "nullifying" that election. The comparability studies, however, are not equivalent to the "fair market

[9] See *Central Elec. Coop., Inc.* v. *Bonneville Power Admin.*, 835 F.2d 199, 203-204 (9th Cir. 1987); *Beck Park Apartments* v. *United States Dep't of Housing & Urban Dev.*, 695 F.2d 366, 370 (9th Cir. 1982).

rental[]" method described in Section 8(c)(2)(A). The "fair market rental[]" method refers to the process for producing Fair Market Rents (FMRs) which reflect the results of surveys of rents in a large number of units in a broad geographic area. See 24 C.F.R. 888.103; 53 Fed. Reg. 14,954 (1988). The FMRs are required to establish the original contract rent. 42 U.S.C. 1437f(c)(1). The comparability studies, in contrast to the FMRs, focus on particular projects and consider a small number of comparable units; they do not establish a rent level for a general area. HUD's limited use of comparability studies therefore does not represent a switch to the "fair market rental[]" method.

While HUD's reading does not nullify a provision of the statute, the Ninth Circuit's reading does exactly that. Section 8(c)(2)(C) *required* HUD to prevent rental adjustments that produce material disparities between comparable assisted and unassisted units. Under the Ninth Circuit's approach, HUD was powerless to prevent such disparities unless it modified the adjustment formula itself. That approach nullifies the statute's authorization for the Secretary to take action when the Adjustment Factors, although working as a general matter, are producing anomalous results in a particular case.

The only other support that the *Rainier View* court found for its interpretation was a HUD regulation, 24 C.F.R. 888.204, that discusses interim revisions of the Adjustment Factors. 848 F.2d at 991. On its face, however, that regulation addresses the situation when the Adjustment Factors may be producing too *low* an adjustment, not when the Adjustment Factors may be producing too *high* an adjustment. In fact,

that regulation implements Section 8(c)(2)(A), not Section 8(c)(2)(C). Another regulation, 24 C.F.R. 880.609(c)—which the court did not cite—fully supports HUD's use of comparability studies.[10] HUD's interpretation of its own regulations is entitled to great deference. See *Martin* v. *Occupation Safety & Health Review Comm'n*, 111 S. Ct. 1171, 1175-1176 (1990); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). The court, however, gave it none.

In sum, the *Rainier View* court erred in finding that respondents have vested contract rights to formula-based rent increases without limitation through comparability studies. Accordingly, respondents lack the property right that the court of appeals found was infringed by Section 801.

2. Even if the HAP contracts did bear the meaning given them in *Rainier View*, the court of appeals' substantive due process holding—that Section 801 unconstitutionally impairs vested contract rights—is wrong.

a. When Congress enacts economic regulation that affects property rights, "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*,

---

[10] That regulation states, in pertinent part:

> *Overall limitation.* Any adjustment of contract rents for a unit after Contract execution * * * must not result in material differences between the rents charged for assisted units and comparable unassisted units * * *.

The regulation reflects HUD's consistent view that Section 8(c)(2)(C) establishes an overall limitation on rents. See 40 Fed. Reg. 18,687 (1975) (promulgating former 24 C.F.R. 880.110(d)); 44 Fed. Reg. 59,428 (1979) (repromulgation of rule as 24 C.F.R. 880.609(c)).

428 U.S. 1, 15 (1976). See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978). The same rationality test applies to the retroactive aspects of economic legislation. *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 728-731 (1984). As this Court reaffirmed just last Term, it does not violate due process for a legislature to respond to the "unexpected results" of a judicial decision by restoring the legal regime that had previously been understood to prevail. *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1112 (1992).

This Court and others have upheld against due process challenges such "curative" legislation designed to respond to a judicial decision. *Romein*, *supra*; *Opdyke Investment Co.* v. *Detroit*, 883 F.2d 1265, 1274-1276 (6th Cir. 1989); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948). The Court has reached that result even when the legislation extinguishes claims against the government. In *Graham and Foster* v. *Goodcell*, 282 U.S. 409 (1931), the Court approved a "curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice." *Id.* at 429. The Court in that case upheld a curative tax statute that cut off a "vested" refund claim, explaining that "[w]here the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist." *Ibid.*

Similarly, Section 801 is a valid instance of "curative" legislation. It is rationally designed to restore a proper basis for adjusting rents in the Section 8 program after that basis was upset by the unexpected decision in *Rainier View*. See note 4, *supra*. The Section 8 landlords long knew of HUD's position that comparability studies were permissible, and were well aware from the Housing and Community Development Act of 1987 that Congress shared that view. In addition, the Section 8 landlords can assert no equities against modification of a contract that, as interpreted by the Ninth Circuit, gives them the right to *above*-market rents; they knowingly entered into a program that was designed simply to provide prevailing market rents. See S. Rep. No. 693, 93d Cong., 2d Sess. 45-46 (1974).

That Congress acted permissibly in enacting Section 801 is further supported by the principle that "sovereign power * * * is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 52 (1986), quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). Accordingly, "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *POSSE*, 477 U.S. at 52, quoting *Merrion*, 455 U.S. at 147.

Congress did not unmistakably surrender its authority to legislate in ways that affect its contractual arrangements with Section 8 project owners. Rather, Section 8 owners, like participants in other federally subsidized housing programs, were well aware that the program was subject to congressional oversight

and action. As this Court has observed about a similar federal housing program, "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958). Section 801 legitimately clarifies the Section 8 program in order to implement its original goals.[11]

b. In striking down Section 801, the court of appeals relied on this Court's decisions in *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935). The court concluded that those decisions prevent Congress from changing contractual obligations of the government "solely to save money." App., *infra*, 14a. The narrow principle established on the distinctive facts of *Lynch* and *Perry* is not applicable here.

In *Lynch*, the Court struck down a law that abrogated the government's obligation to pay benefits on "War Risk" life insurance policies issued during

[11] Even on the Ninth Circuit's reading of the HAP contracts, it is difficult to understand why respondents' "substantial rights" are infringed by Section 801. *The Darlington, Inc.*, 358 U.S. at 91. As the *Rainier View* court saw it, HUD was not barred from using comparability studies altogether, but was limited to using them in making an "adjustment of the [Adjustment Factors]." 848 F.2d at 991. Because such an adjustment could presumably have produced the same financial result for Section 8 landlords as the approach HUD adopted, Section 801 did not alter any substantive right to be free of comparability studies, but simply changed a procedural right governing their use. Such a procedural right should not be held to "rise to the level of 'property,'" *POSSE*, 477 U.S. at 55, such that it is immune from reasonable legislative change.

World War I for which premiums had already been paid. The Court noted that the law in question was "popularly known as the Economy Act," and concluded that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States" on such paid-up insurance policies. 292 U.S. at 580. In *Perry*, the Court held that Congress cannot invalidate the terms of debt obligations the government incurs "on the credit of the United States." 294 U.S. at 350-351. The Court concluded that the constitutional power to borrow money entails the power to make a binding promise that a subsequent Congress cannot "alter" or "destroy." *Id.* at 353-354.

This case is different from *Lynch* and *Perry*. Section 801 does not repudiate a legislatively promised benefit for which private parties paid consideration, as in *Lynch*, nor does it disavow a federal debt obligation undertaken under the constitutional grant of power to borrow money, as in *Perry*. Compare *POSSE*, 477 U.S. at 55. Section 801 adjusts the payment provisions in a comprehensively regulated low-income housing program to ensure that the developers do not reap non-market justified gains. It restores what Congress has always made clear is the basis of the program—prevailing market rents—and fine tunes the methodology for achieving the program's ends. The Ninth Circuit erred in extending *Lynch* and *Perry* to this very different context.

Moreover, the Ninth Circuit erred in concluding that Section 801 was enacted "solely to save money." App., *infra*, 13a. When Congress acted, the dispute between HUD and Section 8 landlords over the use of comparability studies had been litigated in only

one circuit, and Congress disagreed with the holding of *Rainier View*. Nevertheless, one of the central purposes of Section 801 was to put an end to further litigation over the proper construction of the HAP contracts and to establish a proper basis for future rent adjustments. Continued litigation threatened to impede attainment of Section 8's goals, both by diverting administrative resources and by creating a climate of uncertainty for participants. In order to reinstate the program's market-rent premise, and to correct flaws in HUD's use of comparability studies, Congress enacted Section 801. See 135 Cong. Rec. S16,609 (daily ed. Nov. 21, 1989) (remarks of Sen. D'Amato); *id.* at S16,594 (remarks of Sen. Cranston). To be sure, some legislators noted that Section 801 would save the government money that would otherwise be due if *Rainier View* were the final word. See, *e.g.*, 135 Cong. Rec. H9,686 (daily ed. Nov. 21, 1989) (remarks of Rep. Gonzalez); *id.* at S16,607 (remarks of Sen. Sasser). But those statements do not take away from the fact that Section 801 is designed to protect Congress's low-income housing initiative, and has a more complex purpose than simply to reduce government expenditures.

3. The ruling of the court of appeals deserves this Court's review. In the nearly 60 years since *Perry*, no decision of this Court has struck down an Act of Congress on the theory that it abrogated vested property rights in contracts with the government. The court of appeals' conclusion that this case merited such strong medicine deserves this Court's attention.

In addition, the decision of the court of appeals is of great programmatic importance. The Section 8 project-based program is one of the largest housing programs administered by HUD, with a total of over

$100 billion in projected federal subsidies due to project owners. Over 15,000 contracts are in effect nationwide, and all are governed by the statutory provisions and contractual procedures that the Ninth Circuit considered in this case. HUD estimates that the Ninth Circuit's ruling will cost the government approximately $50 million and that, if the decision is applied nationwide, the cost to the Section 8 program will exceed $1 billion. Because of its financial significance, the issue is being litigated in other circuits, and HUD has prevailed in two districts courts and the Claims Court. See note 7, *supra*. Absent this Court's intervention, such litigation will continue.

The significance of this issue is highlighted by the fact that Congress has revisited the Act on two occasions to indicate the appropriateness of comparability studies while placing limitations on their application and use. Section 801 represents Congress's most recent effort to grapple with this issue and to establish an administrative mechanism under which Section 8 rents may be fairly adjusted each year. Under the court of appeals' ruling, however, Congress has lost a large component of its freedom to act in this field.

CONCLUSION

The petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN W. HEROLD
Associate General Counsel

JOHN G. ROBERTS, JR.
Deputy Solicitor General

HOWARD M. SCHMELTZER
Assistant General Counsel

MICHAEL R. DREEBEN
Assistant to the Solicitor General

BART SHAPIRO
Trial Attorney
Department of Housing and Urban Development

DOUGLAS LETTER
Attorney

SEPTEMBER 1992

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-35267

D.C. No. CV-89-01654-BJR

ALPINE RIDGE GROUP, a partnership; MONROE ASSOCIATES, a limited partnership; BRENTWOOD, a limited partnership; CAMPBELL COURTS ASSOCIATES, a partnership; CHENEY GARDENS LIMITED PARTNERSHIP, a limited partnership, ET AL., PLAINTIFFS-APPELLEES

and

BITTERROOT MANOR, a limited partnership, ET AL., PLAINTIFFS-INTERVENORS

v.

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Urban Development; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS-APPELLANTS

No. 91-35573

ALPINE RIDGE GROUP, a partnership; MONROE ASSOCIATES, a limited partnership; BRENTWOOD, a limited partnership; CAMPBELL COURTS ASSOCIATES, a partnership; CHENEY GARDENS LIMITED PARTNERSHIP, a limited partnership, ET AL., PLAINTIFFS-APPELLEES

v.

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Urban Development; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

No. 91-55354

D.C. No. CV-90-0390-MRP

ACACIA VILLA; ALICIA PARK APARTMENTS; AMERIGE VILLA; ANTELOPE VALLEY, ET AL., PLAINTIFFS-APPELLEES

v.

JACK KEMP, Sec. HUD; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

OPINION

Argued and Submitted
October 11, 1991—Seattle, Washington

Filed February 7, 1992

Before: J. Clifford Wallace, Chief Judge, Procter Hug, Jr. and Pamela Ann Rymer, Circuit Judges.

Opinion by Chief Judge Wallace

OPINION

WALLACE, Chief Judge:

The Secretary of the Department of Housing and Urban Development (HUD) appeals from decisions of two district courts, each of which entered a summary or partial summary judgment; one to the Alpine Ridge Group (Alpine) and one to Acacia Villa (Acacia), holding an act of Congress unconstitutional. The district courts had jurisdiction under 28 U.S.C. §§ 1331 and 1361. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I

Alpine and Acacia (owners) are developers and owners of housing projects covered by section 8 of the United States Housing Act of 1937, as amended, 42

U.S.C. § 1437f (Housing Act). Pursuant to the authority granted by Congress in section 8, HUD solicited private developers to submit construction bids for low-income rental housing. HUD or its local designate awarded selected developers Housing Assistance Payment contracts. Under the contracts, the developer/owner collects a portion of the rent from the tenant, based on the tenant's income, while the remainder is paid by the United States as a subsidy. Section 8 also requires HUD to include a provision in the contracts with owners permitting at least annual rent adjustments "to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 42 U.S.C. § 1437f(c)(2)(A).

The owners brought suit against HUD claiming entitlement to yearly "formula" rent increases, basing their claim primarily upon the interpretations of section 8(c)(2)(A) of the Housing Act and section 1.9(b) of the contracts adopted in *Rainier View Associates v. United States Department of Housing and Urban Development*, 848 F.2d 988 (9th Cir. 1988) (*Rainier View*), *cert. denied*, 490 U.S. 1066 (1989). *Rainier View* held that HUD elected to use the "reasonable formula," rather than the "fair market value," method for determining annual rent adjustments in section 8 contracts. *Id.* at 991. The formula method obliges the government to calculate and publish Automatic Annual Adjustment Factors (factors), which are then used to adjust contract rents. Our court reasoned that because HUD elected the formula method, it could employ "fair market" comparability studies only to the extent that it incorporated those studies into the factors used to calculate the formula rent adjustments. *Id. Rainier View* rejected HUD's argument that an "Overall Limitation" provision in the contracts permitted HUD to use market rates to cap rent adjustments under the formula method to prevent "material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government. . . ." *Id.* at 990-91.

Despite our decision in *Rainier View*, HUD has continued to adjust rents, not according to the formula method, but on the basis of market comparability studies. HUD has done this in reliance on the Overall Limitation provision and subsequent congressional amendments to section 8 which adopted HUD's interpretation of the Overall Limitation clause. In 1989, Congress enacted section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987, 2057 (HUD Reform Act), ostensibly to change the result in *Rainier View* and settle the dispute between HUD and section 8 owners regarding the method for calculating annual rent adjustments. Section 801 prescribes one new procedure for computing past rent adjustments, and a different procedure for future adjustments. Under these new methods, owners receive a rent increase that is smaller than, but not less than thirty percent of, the rent adjustments they would have been entitled to under the original formula method.

Both district courts held that the HUD Reform Act violated the fifth amendment due process clause by impairing the owners' vested rights to annual rent adjustments pursuant to their section 8 contracts. The cases were consolidated for purposes of appeal.

II

The constitutionality of a statute is a question of law and, therefore, we review the district courts' ruling de novo. *Trerice v. Pedersen*, 769 F.2d 1398, 1400 (9th Cir. 1985). In order to assert a due process claim under the fifth amendment, the owners must first establish that they have cognizable property rights arising out of their contracts with HUD. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 54-55 (1986) (*Bowen*); *Peterson v. United States Department of Interior*, 899 F.2d 799, 807 (9th Cir.) (*Peterson*), *cert. denied*, 111 S.Ct. 567 (1990). Relying on *Rainier View*, the district courts held that such property rights had been established.

HUD argues that *Rainier View* was incorrectly decided. It urges us to reconsider the issues decided in *Rainier View* in light of section 801 of the HUD Reform Act and section 142 of Public Law No. 100-242 5100 Stat. 1850 (1988). HUD alleges that through these amendments, Congress retroactively clarified the original meaning of section 8. HUD also points to two lower court decisions as authority contrary to *Rainier View*. *See Sheridan Square Partnership v. United States*, 761 F. Supp. 738 (D. Colo. 1991); *National Leased Housing Association v. United States*, 22 Cl. Ct. 649 (1991).

We have previously held that in certain cases involving statutory interpretation, a three-judge panel may reconsider the decision of an earlier panel when intervening legislation retroactively clarifies the meaning of a statute. *Landreth v. Commissioner*, 859 F.2d 643, 648 (9th Cir. 1988) (*Landreth*). There, we held that we were not bound by a prior circuit decision interpreting the IRS Code because a subsequent congressional amendment clarified the meaning of the disputed section. The owners argue that *Landreth* is inapplicable because *Rainier View* was principally a contract, and not a statutory, interpretation case, thereby rendering intervening legislative clarification irrelevant.

Although *Rainier View* discussed the provisions of section 8 in conjunction with its contract analysis, its decision turned on HUD's election in the contracts of the "formula" method for determining rent adjustments. *Rainier View*, 848 F.2d at 990. As a matter of contract law, *Rainier View* held that:

> In the contract, HUD elected the formula method. Having made its choice, HUD cannot now change its mind. The overall limitation provision of the statute and the contract permit HUD to adjust the formula factors in light of market conditions, but it does not permit HUD to abandon entirely the formula method it chose and to adjust rents solely on the basis of a market survey. HUD's interpretation of the overall limitation provision would render the formula method authorized by the statute and elected in the contract a nullity.
>
> . . . .
>
> We thus hold that the contract unambiguously support [sic] Rainier's interpretation.

Id. at 991.

HUD correctly points out that the statute is not wholly irrelevant here because any contract entered into by HUD without congressional authorization would be invalid as *ultra vires*. *Peterson*, 899 F.2d at 807. Even so, *Rainier View*'s interpretation of

the contracts, while not the only approach available to that court, is nevertheless consistent with the language of section 8. Thus, *Peterson* is not an impediment to affirmance. Although HUD disagrees with the interpretation of the contracts set forth in *Rainier View*, this does not disturb the basis for that court's decision, or the consistency of that decision with the underlying statutory language. Because we hold that *Rainier View* was decided as a matter of contract law, we are not free to reexamine the issues in that case under the *Landreth* rule.

HUD contends that if we hold this dispute to be contractual and not statutory for purposes of reexamination under *Landreth*, we lack jurisdiction and must transfer this case to the court of claims, 28 U.S.C. § 1491. We point out that *Rainier View* faced the same question. Because that court decided the case, it must necessarily have determined that jurisdiction was proper. We must follow that decision here.

III

We next address the question whether the owners' rights to receive formula rent increases for section 8 properties are vested. HUD argues that the "property clauses" of the Constitution do not require the federal government "to adhere to a contract that surrenders an essential attribute of its sovereignty." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977) (*United States Trust*). HUD relies primarily on *Bowen*, 477 U.S. at 52, for the argument that Congress, as an exercise of its constitutional sovereign powers, can change statutory language underlying a government contract, thereby changing the contract itself. The "sovereign's power to enact sub-

sequent legislation affecting its own contractual arrangements endures, albeit with some limitations, unless 'surrendered in unmistakable terms.' " *Peterson*, 899 F.2d at 808, *quoting Bowen*, 477 U.S. at 52.

In *Bowen*, states participating in the federal social security system challenged Congress's retroactive repeal of a statutory provision permitting them to terminate participation in the program unilaterally. The Supreme Court rejected the states' due process argument, holding that the act "created no contractual rights." 477 U.S. at 52. The Court stated that the statute did not create any vested rights in light of the fact that Congress expressly reserved the "right to alter, amend, or repeal any provision" of the statute. *Id.* at 51-52 (citation and internal quotations omitted).

Here, the owners do not challenge Congress's power to amend the terms of the underlying legislation in the exercise of "public and general acts of a sovereign." *See Horowitz v. United States*, 267 U.S. 458, 461 (1925). Instead, they assert that their contract rights are supported by independent consideration and are therefore vested under the Supreme Court's decisions in *Lynch v. United States*, 292 U.S. 571 (1934), (*Lynch*), and *Perry v. United States*, 294 U.S. 330 (1935) (*Perry*).

Lynch involved Congress's attempt to withdraw from its obligation to make payments on insurance contracts in order to save money during the Great Depression of the 1930s. The Court held that the payment of premiums by the beneficiaries created vested property rights. 292 U.S. at 576-77. It stated that "Congress was free to reduce gratuities deemed excessive," but "was without power to reduce expenditures by abrogating contractual obligations of

the United States." *Id.* at 580. In *Perry*, 294 U.S. at 353-54, a case involving bond debt, the Court likewise held that "Congress has not been vested with authority to alter or destroy those obligations."

HUD contends that the instant appeals are more akin to cases rejecting due process attacks on retroactive "curative" legislation. *See Wiggins v. IRS*, 904 F.2d 311, 316-17 (5th Cir. 1990); *Opdyke Investment Co. v. City of Detroit*, 883 F.2d 1265, 1274-76 (6th Cir. 1989); *Temple University v. United States*, 769 F.2d 126, 134-35 (3d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986); *Long v. IRS*, 742 F.2d 1173, 1183-84 (9th Cir. 1984). HUD argues that curative legislation by its very nature affects a "property" interest because it eliminates an otherwise accrued claim against the government. Thus, HUD likens this "property" interest to the contract rights asserted by the owners.

Although HUD is correct that a claim may constitute a property right, *see In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 989 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988), its argument is not persuasive because it fails to focus on the source of the right affected by the legislation. If the asserted right is a benefit gratuitously conferred by statute, as in *Bowen*, the repeal or amendment of that statute is not subject to a substantive due process challenge. The owners here, however, have bargained-for *contract* rights, supported by independent consideration. Although these rights were created because a statute authorized HUD to enter into contracts with private developers, this fact does not detract from the fundamentally contractual nature of those rights. We question whether it is within the purview of Congress's power to engage in contract interpretation. It certainly is the duty of the judiciary, a duty that was exercised in *Rainier View*. Thus, section 801 is not "curative" in the sense urged by HUD.

HUD also argues that *Peterson* and *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958), are examples of curative legislation impacting bargained-for contract rights. In *Peterson*, water districts challenged a clause in the Reclamation Reform Act of 1982 requiring the districts to make higher payments for water that was resold for irrigation use on leased lands. The water districts argued that the amendment constituted an impairment of their contracts with the government. *Peterson*, 899 F.2d at 807. We held that the water districts had no implied contractual right to buy cheap water for leased lands, and that the Reclamation Reform Act did not deprive them of due process. *Id.* at 809-10.

Similarly in *The Darlington*, 358 U.S. at 87, 90-91, the Supreme Court held that due process was not violated when Congress amended section 608 of the National Housing Act (NHA). The amendment stated that the NHA originally intended to preclude owners from renting to transients if the owners were receiving federally subsidized mortgage insurance. *Id.* at 86. The Court held that the *implied* contractual right asserted by the plaintiffs had not been established, and that the *original* intent of the NHA was, in fact, to exclude transients. *Id.* at 90.

These cases are distinguishable as instances where courts declined to interpret contracts as containing implied provisions foreclosing the exercise of sovereign power by the government. Neither the claim in *Peterson* nor in *The Darlington* was based on an ex-

plicit contractual provision. In contrast, *Rainier View* held that HUD *explicitly* limited its statutory options by choosing the formula methodology for adjusting rents and bound itself to that choice in the contracts with the owners. Thus, the district courts did not err in holding that the owners had acquired vested property rights.

IV

For the reasons stated above, we conclude, in accord with *Rainier View*, that the owners have a vested property interest in formula-based rent adjustments pursuant to their section 8 contracts. The obligation of the United States to make payments on these interests is unambiguously stated in section 1.6 of the contracts themselves. HUD does not dispute that section 801 substantially impairs the owners' exercise of these property rights. Thus, the remaining question is whether Congress's abrogation of the owners' rights by section 801 of the HUD Reform Act violates due process.

HUD argues that Congress may legislate retroactively in ways that affect private property rights as long as a rational basis for the legislation exists. *United States v. Sperry Corp.*, 493 U.S. 52, 65 (1989). The owners contend that section 801 is subject to heightened scrutiny. Under the contract clause analysis applicable to the states, courts have applied the standard of "reasonable and necessary to serve an important public purpose" in reviewing state modifications of its own obligations. *United States Trust*, 431 U.S. at 25. The contract clause does not apply to the federal government, *see Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732 n.9

(1984), and we have not previously decided whether a like standard applies to Congress under the fifth amendment. The Supreme Court, however, has stated in dicta that a "dual standard of review" applies under the due process clause, with heightened scrutiny of the federal government's impairment of its own obligations. *United States Trust*, 431 U.S. at 26 n.25.

Neither district court resolved this issue because both courts held that Congress abrogated vested contract rights solely to save money. In *Lynch*, 292 U.S. at 580, the Supreme Court ruled that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." The Court subsequently reaffirmed this principle, stating that "Congress does not have the power to repudiate its own debts . . . simply in order to save money." *Bowen*, 477 U.S. at 55; *see also United States Trust*, 431 U.S. at 26 n.25; *Peterson*, 899 F.2d at 808 n.16, 813 n.20. We do not need to decide whether a heightened standard applies to the federal government's impairment of its own obligations if Congress unconstitutionally abrogated the owners' vested rights in order to save money.

HUD concedes that the government may not alter contracts simply to save money, but contends that these appeals are distinguishable from *Lynch* and *Perry*. It argues that the government acknowledged the validity of the debt in *Lynch* and *Perry*, whereas here, Congress enacted section 801 to clarify that no debt obligation exists at all. We have already rejected this argument, however, in ruling that *Rainier View* established a vested property right. This is not a case where Congress alters the effect of a court decision by amending a statute. Through section 801, Congress has attempted to change section 8's original

meaning retroactively, 14 years after its enactment. The fact that Congress does not recognize its obligation under the contracts as interpreted by *Rainier View* does not affect the validity of the owners' rights, or Congress's inability to alter them by retroactively amending the underlying statute.

HUD also denies that Congress acted solely to save money. It argues that section 801 was enacted as a compromise to end litigation over the issue of the appropriate method for determining annual section 8 rent adjustments. HUD points to no authority permitting Congress to legislate a compromise to disputes involving vested property rights in order to prevent costly or wasteful litigation. HUD's argument again assumes the absence of any vested property right in annual formula rent adjustments, an issue that we have decided against it.

HUD is unable to present any argument explaining section 801 as anything other than Congress's attempt to save resources and money by legislating a compromise to its disputes with the owners. We hold that these cases fall within the scope of *Lynch* and *Perry*, and that through section 801, Congress has attempted to reduce an obligation in order to save money. Although HUD and Congress do not recognize this obligation, it has been established by the final judgment in *Rainier View*. Therefore, we hold that section 801 unconstitutionally abrogates the owners' vested property rights in violation of the fifth amendment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-1654R

ALPINE RIDGE GROUP, ET AL., PLAINTIFFS

v.

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Housing and Urban Development; and the UNITED STATES DEPARTMENT OF HOUSING AND UUBAN DEVELOPMENT, DEFENDANTS

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

[Filed Sep. 20, 1990]

THIS MATTER comes before the court on plaintiffs' and defendants' cross-motions for summary judgment. Having reviewed the motions together with all documents filed in support and in opposition, having heard oral argument and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Plaintiffs in this case are owners of housing projects which fall under Section 8 of the United States Housing Act of 1937 as amended, 42 U.S.C. § 1437f. The Section 8 housing program is administered by defendants Secretary and Department of Housing and Urban Development (collectively "HUD"). Pursuant to Section 8 as enacted in 1974, private developers were encouraged to submit proposals to HUD for the construction and operation of federally subsidized low-income housing. The developers chosen by HUD then entered into Housing Assistance Payment (HAP) contracts either with HUD directly or with local public housing agencies authorized by HUD to act as contract administrators. Among other things, these HAP contracts provided for the periodic adjustment of the maximum monthly rent to reflect fair market rents in the local area.

In the early 1980's, a dispute arose between certain Section 8 project owners and HUD concerning the proper method for determining rent adjustments. The owners insisted that, pursuant to their HAP contracts, they were entitled to rent adjustments based on the application of Automatic Annual Adjustment Factors (AAAFs) published each year by HUD. HUD, on the other hand, asserted that it had the right in its discretion to conduct rent comparability studies based on individualized market surveys.

The Ninth Circuit settled the dispute in *Rainier View Associates v. United States Department of Housing and Urban Development*, 848 F.2d 988 (9th Cir. 1988), by holding that the HAP contracts into which HUD had entered clearly and unambiguously required HUD to apply the AAAFs in adjusting rents.

The court noted that while the statutory language of Section 8 would have permitted HUD to use either the AAAFs or comparability studies, HUD had made a binding election of the AAAFs method under the contract and could not change its mind.

In 1989, however, Congress revisited Section 8 by passing an amendment known as Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987, Dec. 15, 1989. In brief, Section 801 prospectively authorizes HUD to adjust rents based on rent comparability studies. As for its retroactive effect, Section 801 applies to all owners whose rerts were previously adjusted on the basis of comparability studies or whose contracts required them to request an adjustment and who failed to do so because of an anticipated negative adjustment. Regarding those owners, Section 801 authorizes HUD to adjust the rents from 1980 to the present by either applying the AAAFs to that portion of the contract rent not attributable to the debt service, or by multiplying 30% of the applicable AAAF by the entire contract rent, whichever is greater.

Plaintiffs in this case allege that Section 801 is unconstitutional on the grounds that it violates their rights to due process under the Fifth Amendment to the United States Constitution.[1] They contend that it

---

[1] Plaintiffs also originally alleged that Section 801 resulted in a taking without just compensation contrary to the Fifth Amendment of the United States Constitution. Based on this claim, which it construed as one for damages, HUD contended that the proper jurisdictional forum for the case was in the United States Court of Claims. *Compare Preseault v. Interstate Commerce Commission*, 110 S. Ct. 914 (1990), in which

does so by impairing their vested contractual rights to rent adjustments based on the AAAFs as provided in their HAP contracts with HUD or authorized public housing agencies. HUD is equally insistent on the constitutionality of Section 801. Both plaintiffs and HUD now cross-move for summary judgment.

II. LEGAL ARGUMENT

A. *Ripeness*

Before turning to the substance of the case, HUD asserts that, insofar as the prospective effect of Section 801 is concerned, plaintiffs' claims are not ripe because HUD has not yet issued regulations implementing Section 801.[2] Accordingly, no final decisions have been made regarding the application of the regulations to any particular housing project.

This argument has no merit. Plaintiffs make it perfectly clear that they are challenging the constitu-

---

the United States Supreme Court held that takings claims for the recovery of damages from the federal government are premature until the property owner has exhausted the remedies available in the Court of Claims.

Without acknowledging any merit in HUD's jurisdictional argument, plaintiffs stated in their responsive brief and reaffirmed at oral argument that they were no longer pursuing a Fifth Amendment taking theory. Plaintiffs' Memorandum of Authorities in Opposition to Defendant's Motion for Summary Judgment and in Reply to Defendant's [sic] Opposition to Plaintiffs' Motion for Summary Judgment, p 6 n.9. HUD recognized at oral argument that plaintiffs' decision to tailor their case mooted its jurisdictional argument.

[2] The implementing regulations were to have been issued within six months of the passage of the legislation, *i.e.*, by June 15, 1990. As of the date of oral argument on September 4, 1990, no regulations had been issued.

tionality of the legislation on its face as violative of their contract rights. They are not asking the court to examine the manner in which Section 801 will be applied to each individual housing project; instead they request a broad declaratory ruling that the legislation is unconstitutional because it conflicts with the language of their HAP contracts guaranteeing them the right to rent increases based on the AAAFs. Thus, the court has no need to consider the effect of regulations or to wait and see what steps HUD takes to implement Section 801.

B. *Analysis of Constitutionality*

Although plaintiffs and HUD reach entirely different conclusions, they do agree on the elements of the analysis to be applied in determining the constitutionality of Section 801. The following questions must be addressed:

1. Pursuant to the HAP contracts, do plaintiffs have a contractual right to rent adjustments based on the AAAFs?
2. If plaintiffs do have a contractual right, is it vested?
3. If plaintiffs have a vested contract right, does Section 801 substantially impair the exercise of that right?
4. If there is a substantial impairment of plaintiffs' vested contract rights, then is the congressional purpose sufficiently important to permit abrogation of those rights?

The court will consider each of these questions in turn:

1. *Existence of Contract Rights*

Plaintiffs and HUD agree that, in order to assert a due process claim under the Fifth Amendment, plaintiffs must establish that they have a cognizable property right arising out of the HAP contracts. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 54-55 (1986); *Peterson v. United States Department of Interior*, 899 F.2d 799, 807 (9th Cir. 1990).

Plaintiffs argue that the answer is plain. As discussed above, the Ninth Circuit unequivocally held in *Rainier View* that plaintiffs have a contractually guaranteed right to rent adjustments based on the AAAFs:

> Under the [Section 8] statute, HUD could choose either a market survey method *or* a formula method. In the contract, HUD elected the formula method. Having made its choice, HUD cannot now change its mind. The overall limitation provision of the statute[3] and the contract permit HUD to adjust the formula factors in light of market conditions, but it does not permit HUD to abandon entirely the formula method it chose and to adjust rents solely on the basis of a market survey. HUD's interpretation of the overall limitation provision would render the formula method authorized by the statute and elected in

[3] The overall limitation provision to which the Ninth Circuit refers states that "[n]otwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; . . ."

> the contract a nullity. It would make all rent adjustments depend on the market survey method. . . .
>
> In sum, the contract clearly elects the formula method, one of two statutorily authorized methods for calculating rent adjustments. The overall limitation provision just as clearly authorizes modifications of the formula applied to keep assisted rents in line with market rents. What the overall limitation provision does *not* do is permit HUD to switch from one method to another. That is clear from the statutory language and HUD's own regulations interpreting the statute. We thus hold that the contract unambiguously support [sic] [plaintiffs'] interpretation.

(Emphasis in original.) 848 F.2d at 991.

HUD's response is two-fold. First, it contends that, pursuant to Section 801, Congress has now reaffirmed HUD's authority to use comparability studies as a limitation on AAAF rent adjustments, thereby expressly rejecting the Ninth Circuit decision in *Rainier View* that Section 8 owners have a right to AAAF adjustments. Relying on cases like *Regents of the University of the University of California v. Bakke*, 438 U.S. 265, 349-50 (1978), HUD argues that this court must defer to a subsequent congressional pronouncement regarding the proper interpretation of a statute. *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969); and *Walt Disney Productions v. United States*, 480 F.2d 66, 68 (9th Cir. 1973).

The court agrees with HUD that heed should be paid to guidance from Congress about the proper

interpretation of statutes. Unfortunately for HUD, that is not the issue in this case. There is no question that HUD had the authority under the statute when it entered into HAP contracts to use comparability studies as a limitation on AAAF adjustments, and *Rainier View* itself so states. But what *Ranier View* then went on to hold is that, despite HUD's statutory authority to choose differently, it elected to limit itself *contractually*. It is not within the purview of Congress to engage in contract interpretation; that is a function of the judiciary which it duly exercised in *Rainier View*.

HUD also argues that even if the *Rainier View* ruling regarding Section 8 owners' rights must be followed, plaintiffs in this case were not parties to *Rainier View*. HUD contends that this court must analyze plaintiffs' claims under the law as it now stands under the new legislation. *League to Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d 1164, 1172-73 (9th Cir. 1979), *citing Bradley v. School Board of City of Richmond*, 416 U.S. 696, 712 (1974); *Peterson v. United States Department of Interior*, 899 F.2d 799 (9th Cir. 1990).

The court rejects HUD's argument. For one thing, this court is bound by the Ninth Circuit decision in *Rainier View*. Insofar as the provisions in plaintiffs' HAP contracts are the same as those construed in *Rainier View*, this court must follow that decision. Moreover, as the court pointed out above, the Ninth Circuit already recognized HUD's statutory authority to conduct comparability studies when it reached its decision in *Rainier View*. Since the new legislation merely reaffirms that point, HUD has no basis for arguing that the existence of the new legislation

should lead to any different result in this case on the issue of *contractual* interpretation decided by *Rainier View*.[4]

2. *Vested Nature of Contract Right*

Having established that plaintiffs do have a contract right to AAAF adjustments under their HAP contracts, the court turns to the question of whether that right is vested.

As a preliminary matter, the court notes that plaintiffs do not challenge the authority of Congress to amend the Section 8 program. There is no doubt that Congress had full authority to alter the terms of the program or even to abolish it completely. Plaintiffs' contention is instead that, in keeping with Fifth Amendment due process considerations, Congress did not have the power to nullify the contract obligations incurred by the federal government pursuant to HUD's HAP contracts with plaintiffs.

HUD responds that, according to well-established principles governing the exercise of sovereignty,

---

[4] For this reason, *Peterson v. Department of Interior*, 899 F.2d 799 (9th Cir. 1990), on which HUD relies is inapposite. In *Peterson*, plaintiffs alleged that the Reclamation Reform Act of 1982 violated their Fifth Amendment due process rights by depriving them of subsidized water which they were contractually entitled to receive from federal reclamation projects. As HUD points out, the Ninth Circuit found no constitutional violations because plaintiffs' contracts, read in conjunction with the underlying statutory authority, did not grant plaintiffs any vested rights to subsidized water. In *Rainier View*, on the contrary, the Ninth Circuit concluded that plaintiffs did possess vested contract rights. The court notes that Judge Norris, the author of the *Peterson* decision, was also on the panel which decided *Rainier View*.

Congress retains the power to modify obligations of the United States by subsequent legislation unless it expressly relinquishes that power. HUD relies on *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), in which the United States Supreme Court held:

> While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, see *Perry v. United States*, 294 U.S. 330, 350-354 (1935); *Lynch v. United States*, 292 U.S. 571 (1934), we have declined in the context of commercial contracts to find that "a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). . . . [S]overeign power, even when unexercised, is an enduring presence that governs all contracts subject to that sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."

477 U.S. at 52.

Before reaching any conclusion about the applicability of the reasoning in *Bowen* to this case, the facts bear inspection. In *Bowen*, the Supreme Court considered whether the states had a vested contractual right to terminate their participation in the Social Security system. When Congress initially passed the Social Security Act of 1935, 42 U.S.C. § 301 *et seq.*, it excluded from coverage all employees of states and their political subdivisions. In 1950, however, Congress responded to pressure from states seeking So-

cial Security coverage for their employees by enacting § 418, which authorizes voluntary participation by states in the Social Security system. States electing coverage entered the system by executing an agreement with the Secretary of Health and Human Services. State and local entities from all fifty states thereafter entered into § 418 agreements.

As enacted in 1950, § 418 also allowed states to terminate their agreements upon two years advance notice in writing to the Secretary. Until the mid-1970's, very few states elected to do so. But beginning in 1977, the number of such terminations increased until they exceeded the number of newly-covered employees. In 1983, Congress, fearing for the integrity of the Social Security system, amended § 418 by repealing the termination provision. The amendment applied to all terminations even if notice had been filed prior to the enactment of the legislation.

The state of California and several of its public agencies filed suit, arguing that they had been unconstitutionally deprived of their contractual right under the § 418 agreement to terminate their participation in the Social Security system. The United States Supreme Court concluded in *Bowen* that, given the nature and provisions of the legislation pursuant to which the federal government entered into the § 418 agreements, the states did not acquire any enforceable contract rights. Whatever contractual arrangement the parties had reached thus remained subject to change by subsequent legislation.

Having carefully considered the ruling in *Bowen*, this court finds that it is inapposite. As the Supreme Court stressed, the termination provision of the § 418 agreement

> constituted neither a debt of the United States, see *Perry v. United States, supra,* nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium, see *Lynch v. United States, supra.* The termination clause was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration. Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare.

Id. Given these circumstances, the Supreme Court concluded that the termination provision of the § 418 agreement did not rise to the level of "property" within the meaning of the Fifth Amendment and could not confer any sort of vested right in view of Congress' reserved power to amend the legislation.

The situation before this court is very different. Unlike the § 418 agreements, the HAP contracts were bargained-for agreements for which plaintiffs did pay independent consideration. As such, the contracts here are akin to the agreements in *Perry v. United States*, 294 U.S. 330 (1935) (life insurance contracts between the federal government and private parties) and *Lynch v. United States*, 292 U.S. 571 (1934) (contract between federal government and private holders of federal bonds) which the Supreme Court was careful to distinguish from the situation in *Bowen.* Like the argreements in *Perry* and *Lynch*, the HAP contracts clearly do create financial obligations on the part of the United States which vest contract rights in plaintiffs.

Indeed, the HAP contracts included a provision pledging the full faith and credit of the United States government to the payment of the obligations incurred under the contract. Paragraph 1.6 of the HAP contracts stated: "*Government Assurances to Owner.* The execution of this agreement by the government signifies that the faith of the United States is solemnly pledged to the payment of housing assistance payments pursuant to the contract and and that funds have been obligated by the government for such payment."

3. *Substantial Impairment of Contract*

If, as the court has concluded above, plaintiffs had vested contractual rights to rent adjustments pursuant to the AAAFs, then HUD does not dispute that Section 801 substantially impairs plaintiffs' exercise of those rights.

4. *Permissible Abrogation of Contract Rights*

Having found that the plaintiffs possess vested contract rights which are substantially impaired by Section 801, the court must finally consider whether Congress is, nevertheless, permitted to abrogate those rights in furtherance of a public purpose.

The parties differ significantly in their analysis of the appropriate standard to apply in deciding this question. HUD maintains that Congress need only have a rational basis for enacting Section 801.[5]

---

[5] In support of this proposition, HUD cites *United States v. Sperry Corp.*, 110 S. Ct. 387, 396 (1989); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); and *Orrego v. United States Department of Housing and*

Plaintiffs, on the other hand, insist that the courts must use a heightened review standard when examining congressional legislation impairing the federal government's own contracts.[6] *Compare United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25 (1977), a case under the Contract Clause of the United States Constitution, Art. 1, § 10, cl. 1, in which the Court held that the Contract Clause was not an absolute bar to subsequent modifications of a state's own financial obligations: "As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."

But despite their differences of opinion concerning the standard of review, both plaintiffs and HUD agree that Congress cannot abrogate vested contract rights solely to save money. In *Lynch*, 292 U.S. at 580, the Court stated categorically that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." The Court repeated this holding two years later in Perry, 294 U.S. at 352-54. More recent cases reiterating this principle include *Larionoff v. United States*, 533 F.2d 1167, 1179-80 (D.C. Cir. 1976), and *Orrego*, 701 F. Supp. at 1395-96.

Urban Development, 701 F. Supp. 1384, 1396-97 (N.D. Ill. 1988). Only the last case involves a contract between the federal government and a private party.

[6] Plaintiffs point to a few sentences from p. 477 of *Nowak on Constitutional Law* (1983) as well as some rather vague language from *Perry v. United States*, 294 U.S. 330, 350 (1935). *See also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978).

HUD argues strenuously that, while saving money may have been part of the congressional motivation for enacting Section 801, Congress also had several other purposes which rescue the legislation from unconstitutionality. These include: 1) effectuating the original congressional objective of avoiding excessive rents and rates of returns for Section 8 projects; 2) redressing HUD's inconsistent application of comparability studies; 3) ensuring a reasonable rate of return to Section 8 owners; and 4) resolving widespread disputes over HUD's use of comparability studies in adjusting Section 8 rents.

Regarding the first and third reasons as stated by HUD, these are simply thinly veiled attempts to recast the essential congressional purpose of saving money. As for the fourth justification for the legislation, resolving widespread disputes, the only reason for the continued existence of a controversy was HUD's refusal to accept the *Rainier View* decision as binding. The second justification is at first blush somewhat more convincing. But only if a threshold determination is made that comparability studies are even applicable does Congress even have to reach the issue of how to conduct them. In the case of plaintiffs, that threshold showing has not been made.

Compare Larionoff, supra at 1180, in which the District of Columbia Circuit reviewed congressional reasons for repealing a military reenlistment bonus. The court found that, although the stated reason was to increase military flexibility in granting bonuses, "our review of the legislative history leads us to conclude that the Congress was primarily concerned with reducing government expenditures by more narrowly tailoring the reenlistment bonus scheme to

actual military requirements." The *Larionoff* court accordingly held that the legislation was unconstitutional.

III. CONCLUSION

For the above-stated reasons, the court finds that Section 801 is unconstitutional in that it violates plaintiffs' due process rights under the Fifth Amendment.[7]

DATED at Seattle, Washington this 19th day of September, 1990.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
Chief United States District Judge

[7] Given this result, the court need not address plaintiffs' other contention that Section 801 constitutes a questioning of the public debt in violation of the Fourteenth Amendment to the United States Constitution.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case Number: C89-1654R

ALPINE RIDGE GROUP, ET AL., PLAINTIFFS

v.

JACK F. KEMP, ET AL., DEFENDANTS

JUDGMENT IN A CIVIL CASE

☒ *Decision by Court.* This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the court finds Section 801 to be unconstitutional in that it violates plaintiffs' due process rights under the Fifth Amendment: plaintiffs' motion for summary judgment is granted; defendants' cross motion for summary judgment is denied.

Date 21 September 1990

BRUCE RIFKIN
Clerk

/s/ Elizabeth Tyree
ELIZABETH TYREE
(By) Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-1654R

ALPINE RIDGE GROUP, ET AL., PLAINTIFFS

v.

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Housing and Urban Development, ET AL., DEFENDANTS

ORDER GRANTING SUPPLEMENTAL RELIEF IN PART

[Filed Apr. 16, 1991]

THIS MATTER comes before the court on plaintiffs' motion for supplementary relief based upon declaratory judgment. Having reviewed the matter, together with all documents filed in support and in opposition, and being fully informed, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Plaintiffs are owners of housing projects that fall under Section 8 of the United States Housing Act of 1937 as amended, 42 U.S.C. § 1437F. The Section 8

housing program is administered by defendants Secretary and Department of Housing and Urban Development ("HUD"). As discussed in prior orders, this case is part of an ongoing dispute between housing project owners and HUD over how rent adjustments are to be computed.[1]

Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987, Dec. 15, 1989, authorized HUD to adjust rents on Section 8 housing projects based on rent comparability studies. Plaintiffs, however, had entered into contracts with HUD entitling them to rent adjustments based on the application of Automatic Annual Adjustment Factors ("AAAFs"). On September 20, 1990, this court found that Section 801 impaired plaintiff's vested contractual right to rent adjustments based on the AAAFs as provided in their contracts with HUD or authorized public housing agencies. HUD's January 1991 appeal of that decision is pending before the Ninth Circuit Court of Appeals. In February, HUD

---

[1] In *Rainier View Associates v. United States Department of Housing and Urban Development*, 848 F.2d 988 (9th Cir. 1988), the Ninth Circuit held that prior contracts between Section 8 housing project owners and HUD clearly and unambiguously required HUD to apply the AAAFs in adjusting rents. After the Ninth Circuit entered that ruling, plaintiffs had to petition this court to order HUD to fulfill their contractual obligations. *See* Plaintiffs' Reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Supplemental Relief, Exhibit A (*Rainier View Associates v. United States, et al.*, No. C83-997R, Order Granting Government's Motions for Clarification and Entry of Judgment, Denying Stay Pending Appeal and Denying Plaintiffs' Motion for Contempt Judgment (April 15, 1988)).

began making rent adjustments based on the applicable AAAFs. Declaration of Robert L. Stettner, para. 4 and attachment 1. The AAAF-based rent adjustments are made from the latest HUD-approved rent, not from what the rent would have been had HUD been applying the AAAFs as they were obligated to under their contracts with plaintiffs. Defendants' Memorandum in Opposition, at 4 n.4.

Plaintiffs now request that this court enforce its declaratory judgment by: (1) ordering HUD to *immediately* set current rents at the levels that would have resulted if past rent adjustments had been based on the AAAFs; (2) ordering HUD to make all prospective adjustment based on the AAAFs; (3) ordering HUD to pay plaintiffs the AAAF rents wrongfully withheld by HUD through the date of the order; (4) enjoining HUD from imposing selective and discriminatory practices on plaintiffs, including the refusal to process rent adjustments and reserve disbursement because project funds were used to enforce plaintiffs' rights against HUD, and the refusal to correct mathematical errors and otherwise deal in good faith with plaintiffs; and (5) awarding plaintiffs attorneys fees and expenses incurred in bringing this motion pursuant to 28 U.S.C. § 2412(d).[2]

II. DISCUSSION

As noted above, this is not the first time that HUD, despite adverse judicial rulings, has been reluctant to fulfill its contractual obligations to apply rent adjustments based on AAAFs. HUD now contends

[2] Plaintiffs also ask the court to order its September 20, 1990, order binding on the HUD and its officers and agents. Such an order is unnecessary. All of this court's orders in this case are binding on the parties.

that an additional order from this court is not necessary because: (1) this court no longer has jurisdiction to grant the supplemental relief requested by plaintiffs; (2) even if this court has jurisdiction, HUD would be entitled to a stay pending appeal; (3) money damages such as those requested by plaintiffs cannot be obtained from the government absent a waiver of sovereign immunity; (4) the injunctive relief requested by plaintiffs with respect to discriminatory and selective treatment of plaintiffs has no basis in fact and is too vague to form the basis for relief; and (5) HUD has agreed to make rent adjustments based on the applicable AAAFs pending the outcome of its appeal.

A. *Jurisdiction*

Where a notice of appeal has been filed, the district court retains jurisdiction only to enforce a judgment and may not alter or enlarge the scope of its judgment while that judgment is on appeal. *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987). Thus, the initial issue for the court is whether the plaintiffs' requested relief, if granted, would enlarge the scope of its judgment or whether it would merely enforce the judgment.

1. *Request for Injunctive Relief from Alleged Discriminatory and Selective Behavior*

Enjoining defendants from engaging in discriminatory or selective behavior toward the plaintiff Section 8 housing projects clearly would expand or alter the judgment. Such behavior was not before the court on plaintiffs' complaint for declaratory judgment. In addition, the vague allegations made

by plaintiffs and in the Affidavit of Janet Marie are an insufficient basis for granting injunctive relief since they do not specify particular, identifiable instances of selective and discriminatory behavior. Furthermore, Robert L. Stettner, head of the Seattle HUD office's division of Housing's Multifamily Loan Management Branch, denies that HUD has engaged in any discriminatory or selective behavior with respect to plaintiffs or Ms. Marie. Declaration of Robert L. Stettner, paras. 7, 9, 10.

2. *Request for Attorneys Fees*

Imposition of sanctions through award of attorneys fees or institution of contempt proceedings also would enlarge or alter a court's judgment. *See Donovan v. Mazzola*, 761 F.2d 1411, 1414 (9th Cir. 1985).

3. *Request for Prospective and Retroactive Rent Adjustments Based on AAAFs*

Plaintiffs final requests for relief are that the court order defendants to: (1) immediately set current rents at the levels that would have resulted if past rent adjustments had been based on the AAAFs; (2) make all prospective rent adjustments based on the AAAFs; and (3) pay plaintiffs the AAAF rents wrongfully withheld through the date of this order.

When the court ruled that Section 801 was unconstitutional, meaning unlawful, it assumed that HUD would discontinue using it as authority for making rent adjustments and would return instead to the manner specified in its contract with plaintiffs. However, apparently thinking that the court's order declaring Section 801 unconstitutional was merely an advisory opinion, HUD chose to ignore

it for five months. Only in February did HUD begin to make rent adjustments based on the applicable AAAFs. Declaration of Robert Stettner, para. 4 and attachment 1. Nonetheless, these rent adjustments were apparently based on the pre-existing rents and not on rents that would have resulted if past rent adjustments had been based on the AAAFs.

This court's holding that Section 801 is unconstitutional was not a whim. The court expected HUD to act in accordance with that ruling. Apparently HUD is incapable of doing so without further guidance. Such additional guidance does not enlarge or alter the scope of the September 20, 1990, order, rather it is designed only to effectuate it. Pursuant to 28 U.S.C. § 2202 this court has the authority to grant the relief necessary to effectuate a declaratory judgment.[3]

B. *Stay Pending Appeal*

HUD has not asked for a stay of this court's September 20, 1990, order holding Section 801 unconstitutional, nor would it be automatically entitled to such a stay. Although the presumed constitutionality of an act of Congress weighs in favor of granting a stay pending appeal, *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984), the court must still examine the moving party's likelihood of success on the merits and chances of irrepara-

[3] Defendants' reliance on *Steffel v. Thompson*, 415 U.S. 452, 472, 483, is misplaced. Defendants' Memorandum in Opposition at 3 n.3. *Steffel* dealt with a federal court's power to enjoin state law enforcement activities to enforce a declaratory judgment. At issue in this case is enforcement of a declaratory judgment holding a federal statute unconstitutional.

ble harm. *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983). However, until HUD moves for a stay of enforcement of the September 20, 1990, order holding Section 801 unconstitutional, this court will not further address the merits of staying any enforcement orders pending appeal.

C. *Enforcement Prohibited by Sovereign Immunity*

HUD contends that sovereign immunity, absent a waiver, prohibits an award of money damages through specific enforcement of contract rights. The court notes initially that plaintiffs here, with the exception of their request for attorney's fees, do not ask for money damages except in enforcement of existing contract rights. In addition, HUD's argument that sovereign immunity bars this court from specifically enforcing plaintiffs' contract rights is not persuasive. The authority cited by HUD, *Price v. GSA*, 894 F.2d 323 (9th Cir. 1981), refers to limits on specific enforcement of pre-award contract rights, not specific enforcement of *existing contract rights.*

Plaintiffs here ask only that HUD comply with this court's ruling that Section 801 is unconstitutional by making retroactive and prospective rent adjustments through application of the AAAFs, a remedy this court awarded previously in a similar effort by Section 8 housing project owners to enforce their existing contract rights. *Rainier View Associates v. United States, et al.*, No. C83-997R, Order Granting Government's Motions for Clarification and Entry of Judgment, Denying Stay Pending Appeal and Denying Plaintiffs' Motion for Contempt Judgment (April 15, 1988). *See also Acacia Villa v. Kemp, et al.*, No. 90-0390 MRP (Sx), Final Judgment Pursuant to

Fed. R. Civ. P. 54(b) (C.D. Cal. Oct. 31, 1990) (declaring Section 801 unconstitutional and ordering HUD to pay future rent increases by applying the AAAFs to the rent that would have been in force if HUD had applied the AAAFs in the past without rent comparability studies).

III. CONCLUSION

In summary, it is well within this court's power under the Declaratory Judgment Act, 28 U.S.C. § 2202, and within its jurisdiction pending appeal to enforce its September 20, 1990, order holding Section 801 unconstitutional.

It is hereby ORDERED, ADJUDGED and DECREED that:

(1) plaintiffs' motion for supplementary relief is GRANTED in part;

(2) defendant is to set current rents at the levels that would have resulted if past rent adjustments had been based on the AAAFs;

(3) defendant is to make all prospective rent adjustments based on the AAAFs;

(4) defendant is to pay plaintiffs the AAAF rents wrongfully withheld from the date of its September 20, 1990, order through the date of this order; and

(5) plaintiffs' requests for attorneys fees and for an injunction barring defendants from selective and discriminatory behavior toward plaintiffs are DENIED.

DATED at Seattle, Washington this 16th day of April, 1991.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
Chief United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 90-390 MRP

ACACIA VILLA, A California Partnership, ET AL., PLAINTIFFS

v.

JACK KEMP, ET AL., DEFENDANTS

MEMORANDUM OF DECISION

[Filed Oct. 31, 1990]

The Court having read and considered all the papers filed in support of and in opposition to the plaintiffs' motions for partial summary judgment and defendants' motion for summary judgment has concluded that:

I. *Background*

Plaintiffs are private developers who, between 1974 and 1988, entered into long term contracts with the Department of Housing and Urban Development ("HUD") to provide low-income rental housing. These contracts, known as Housing Assistance Payments ("HAP") contracts, were entered into pursuant to Section 8 of the Housing Act of 1937, as amended, 42 U.S.C. § 1437f ("Section 8"). Section

8 provides rent subsidies to low income families. Those families pay rent based upon a percentage of their income, and the federal government pays the difference between the tenant's contribution and the contract rent of the unit directly to the developer. The contract rent—the maximum monthly rent to which the project owner is entitled—is based upon the original rent specified in the HAP contract, adjusted at least annually to reflect changes in fair market rentals. Prior to its amendment in 1988, Section 8 authorized the Secretary to adjust rents by either of two methods: the formula method, under which the new contract rent would be determined by multiplying the existing contract rent by an "Automatic Annual Adjustment Factor" ("AAAF") published in the Federal Register, or the "comparability study" method, under which adjustments would be based on market surveys of comparable unassisted units.

Plaintiffs claim that under their HAP contracts application of the AAAF formula was expressly selected as the procedure for calculating rent adjustments, and that HUD has breached its contract by failing to make rent adjustment payments according to that formula since 1983. In 1988, the Ninth Circuit held, in *Rainier View Associates v. United States*, 848 F.2d 988 (9th Cir. 1988) *cert. denied*, 109 S. Ct. 2065 (1989), that contract language identical to the language in plaintiffs' contracts bound HUD to calculate rent adjustments according to the published AAAF formula.[1] *Rainier*, 848 F.2d at 991.

---

[1] The *Rainier* court rejected the argument that an overall limitation provision in the contracts, providing that the rent adjustments could not result in material differences between rents charged for Section 8 units and comparable unassisted units, provided an independent basis for resorting to com-

HUD applied for but was denied certiorari in *Rainier* in 1989. Presumably to avoid a flood of litigation, HUD sent a letter to Section 8 project owners in the Ninth Circuit stating that it would comply with *Rainier*, and apply the AAAF method both retroactively and prospectively to all project owners who could sue in the Ninth Circuit without requiring them to file complaints.

Before HUD took action to comply with this policy, the Congress passed the HUD Reform Act of 1989, Pub. L. No. 101-235, § 801, 103 Stat. 2058, December 15, 1989 ("§ 801"), which prescribes a new method for computing rent adjustments. The statute establishes one procedure for recalculating past adjustments and a different procedure for determining future adjustments.

Section 801's retroactive provisions mandate recalculation of past rent adjustments where use of comparability studies did not raise rents to the level permitted by the AAAF method.[2] But § 801 does

---

parability studies. The overall limitation provision states that "notwithstanding any other provisions of this Contract, adjustments . . . shall not result in material differences between rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents . . . to the extent that such differences may have existed with respect to initial Contract Rents." The court interpreted that language as a limitation on calculation of the formula rather than as an independent basis for making rent adjustments according to comparability surveys. *Rainier*, 848 F.2d at 991.

[2] The retroactive provisions apply for Fiscal Year 1980 until the regulations governing future rent adjustments under § 801 go into effect.

not adopt the traditional AAAF method to make this recalculation. Instead of applying the published AAAF formula to the full existing contract rent to determine the proper adjustment, § 801 applies the formula to a different amount—the portion of the existing rent which is not attributable to debt service. This obviously would result in a smaller increase than under the traditional AAAF method. Congress did, however, establish a floor in the new statute to ensure that the monthly adjustment would not be too small. Under § 801, developers are entitled to at least 30% of what they would have received if the AAAF had been applied to the entire existing contract rent each time an adjustment was made.

Plaintiffs contend that debt service represents between 17.8% and 66.1% of the monthly rental payment depending on the project. Therefore, plaintiffs argue, most developers will receive the 30% minimum under § 801. HUD does not seem to dispute that this will, in fact, be the result. Adjustments are to be paid over a period of three years, without interest. Plaintiffs contend that the § 801 recalculation deprives them of the full rent adjustments to which they are entitled under their HAP contracts.

The prospective provisions of § 801 authorize future rent adjustments to be made in one of three ways, depending upon the circumstances: 1) Application of the AAAF to the existing contract rent; 2) Where the AAAF would result in material differences between rents charged for comparable assisted and unassisted units, a Modified Annual Adjustment Factor ("MAAF") may be applied. The MAAF is determined by studying rents in a geographical area smaller than that used to calculate the AAAF; 3)

Where the MAAF also results in material differences, § 801 authorizes the use of comparability studies, conducted in accordance with new regulations to be established by the Secretary of HUD.

Project owners may request a one-time determination of contract rent to serve as the basis for future rent adjustments. The new contract rent will be the greater of the contract rent currently approved by the Secretary of HUD (unaffected by the recalculation in accordance with the retroactive provisions of § 801) or the contract rent as calculated under the retroactive provisions.[3] If the project owner makes no such request, the basis will be the currently approved contract rent. Plaintiffs argue that, regardless of which method of measuring future rent adjustments is applied to them, they necessarily are deprived of the full adjustments to which they are entitled under the HAP contracts.

Plaintiffs seek declaratory relief based upon breach of contract, violations of the Administrative Procedure Act, the Housing Act, HUD regulations and several provisions of the Constitution, including the Due Process Clause, the Takings Clause, and the Section Four of the Fourteenth Amendment. The defendants ("HUD" or "the government") invoke § 801 as a defense to all these claims. Plaintiffs argue that § 801 is unconstitutional, and therefore is no defense.

Plaintiffs' Motion for Partial Summary Judgment seeks summary judgment as to Count I, the breach

[3] That is, the contract rent that would be in effect had the AAAF been applied all along to a base rent equal to the contract rent less the amount of the contract rent attributable to debt service.

of contract claim, anticipates HUD's invocation of § 801 and argues that it is unconstitutional. After the filing of this motion, plaintiffs filed an amended complaint, adding Count X, which alleges that § 801 violates the plaintiffs' due process rights, effects a taking without just compensation, and is an unconstitutional questioning of the public debt. The subsequent Motion for Partial Summary Judgment as to Count X addresses issues already discussed in the earlier motion, except that they are framed as affirmative claims rather than as arguments raised in anticipation of defendant's defense. HUD's Motion for Summary Judgment takes the position that § 801 moots plaintiffs' claims, that this court does not have jurisdiction to review the constitutionality of § 801 and that, in any event, § 801 is constitutional.

II. *Discussion*

A. *Mootness of Plaintiffs' Claims*

HUD argues that plaintiffs' breach of contract claim is mooted by § 801 because § 801 provides an exclusive method for calculating past and future contract rents and rent adjustments. However, defendants at the same time concede that the challenge to the constitutionality of § 801 is not moot. The cases cited by defendant for the proposition that intervening legislation or clarifying amendments to legislation may moot a controversy by removing the basis for the plaintiff's claim did not involve new legislation whose constitutionality was being questioned. *See, e.g., Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414-15 (1972) (per curiam) (challenge to tax for church parking lot mooted by repeal of the exemption where validity of the repealing legislation

was not contested); *U.S. Dept. of Justice v. Provenzano*, 469 U.S. 14, 15 (1984) (issue under Freedom of Information Act mooted by intervening legislation where validity of the intervening legislation was not challenged). Section 801 cannot be used as a basis for mooting any claims until the threshold question of its constitutionality is addressed.

B. *Ripeness of the Takings Claim*

The Court agrees with HUD that the takings claims are premature because plaintiffs must first avail themselves of the process provided by the Tucker Act. The Fifth Amendment does not preclude the government from taking private property; it only prevents taking without just compensation. A property owner has no claim for a taking where there is an adequate process for obtaining compensation, and that process yields just compensation. Thus, takings claims against the federal government are not ripe until the property owner has first sought and been denied just compensation through the Tucker Act process. *Pressault v. I.C.C.*, 110 S. Ct. 914, 921 (1990) (even if "rails-to-trails" statute gave rise to a taking, the requirements of the Fifth Amendment were satisfied since compensation was available through the Tucker Act); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195-96 (1985) (takings claims based on a zoning ordinance not ripe until plaintiff has been denied compensation through state's reverse condemnation process). In order to pursue a Tucker Act remedy in this court, plaintiffs would have to establish Little Tucker Act jurisdiction, which they have failed to do. Defendant, therefore, contends that the Claims Court has exclusive jurisdiction.

Plaintiffs respond with two arguments. First, they argue that a suit for denial of just compensation is not a prerequisite for takings claims involving deprivations of money as opposed to real property or other non-fungible goods. However, the cases cited by plaintiff for this proposition do not support it. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), is not a suit against the federal government. The other case cited by plaintiffs, *Fern v. United States*, 1990 U.S. App. LEXIS 11886 *8-*9, states only that where a Tucker Act remedy is inadequate, voiding of the statute in question or some other relief may be appropriate. It does not suggest that the plaintiff may, in such cases, dispense with the Tucker Act procedure.

Plaintiffs' second argument is that Little Tucker Act jurisdiction need not be shown because they are seeking declaratory relief, rather than pecuniary damages. However, the principles of *Pressault* apply even where plaintiff is seeking declaratory relief. Indeed, the plaintiffs in *Pressault* whose claims were dismissed for being unripe were themselves seeking a declaration that the statute in question effected a taking, in violation of the Constitution. *Pressault*, *supra*, 110 S.Ct. at 918. The issue here is the same issue that was decided in *Pressault*; this Court cannot find that a statute effects an unconstitutional taking before plaintiffs have sought and been denied just compensation. If the Tucker Act remedy proves inadequate in addressing plaintiff's prospective claims, plaintiffs may be entitled to return to the district court, but *Pressault* requires that they seek just compensation first.

Plaintiffs' retroactive claims could arguably be heard if § 801 were construed as having withdrawn

the Tucker Act remedy as to those claims; but for the reasons stated below, the Court finds that § 801 cannot be so construed. The statute describes the formula under § 801 as the "exclusive method" for calculating past rent adjustments. The Supreme Court, however, has held that a Tucker Act remedy always exists unless the statute unambiguously withdraws that remedy. *Pressault, supra*, 110 S. Ct. at 922-23. Provisions precluding any payments under an act without prior appropriation have been construed not to preclude a Tucker Act remedy. *Id.* at 922. Given this strong presumption against finding that the Tucker Act remedy has been withdrawn and the fact that § 801 makes no mention of the Tucker Act, the Court concludes that Tucker Act jurisdiction still exists. The takings claim cannot be adjudicated at this time.

C. *Ripeness of the Due Process Claims*

HUD makes two arguments with respect the ripeness of the due process claim. First, HUD argues that the due process claims must also be heard in Claims Court. The Court disagrees. The remedy for a violation of due process is not "just compensation" but "invalidation of the regulation [or statute] and if authorized and appropriate, actual damages." *Williamson, supra*, 473 U.S. at 197. *Williamson* does not support the proposition that where a takings claim must be heard in the Claims Court, the parallel due process claim must be heard along with it. The plaintiffs in *Williamson* claimed that a county zoning ordinance effected an unconstitutional taking and violated their due process rights. The *Williamson* court concluded that the takings claims in that case were

unripe both because the plaintiff had not first sought a variance in the ordinance and because the plaintiff had failed to seek just compensation through the state's reverse condemnation procedures. The unripeness of the due process claim was founded only upon the former issue. *Id.* at 199-200. There was no indication that the court considered the two claims inseparable. District courts have reached the merits on due process claims that, like the claims here, involved actions that could also have been characterized as takings. Those courts did not even address whether the due process claim should be heard in the claims court. *Orrego v. U.S. Dept. of Housing and Urban Development*, 701 F. Supp. 1384 (N.D. Ill. 1988) (due process challenge to the Emergency Preservation Act on ground that it impairs the federal government's obligations rejected on its merits); *Larionoff v. United States*, 533 F.2d 1167, 1180 (D.C. Cir. 1976), *aff'd.* 431 U.S. 864 (1977) (legislation retroactively denying reenlistment bonuses to which plaintiffs had a contractual right found unconstitutional). In *Alpine Ridge v. Kemp*, a suit brought by Section 8 project owners in the Western District of Washington raising an identical due process challenge to § 801, Judge Rothstein reached the merits without addressing this issue. *Alpine Ridge*, No. C89-1654R, Order Granting Plaintiffs' Motion for Summary Judgment (W.D. Wash., Sept. 20, 1990).

HUD's second argument is that plaintiffs' prospective claims are not ripe because it is not yet known how § 801 will affect each individual project. HUD points out that § 801 does not specify how or when comparability studies, the MAAF or AAAF will be used, and implementing regulations have not yet been

issued. While HUD is correct that the precise effect of § 801 is unknown, disposition of plaintiffs' motion does not depend on those facts. Plaintiffs' position is that § 801 *necessarily* deprives them of their right to future rent increases as provided in their contracts, no matter what the regulations provide. The Court agrees with plaintiffs that § 801, to the extent that it authorizes the use of the AAAF or MAAF, locks the project owners into a base rent that is lower than what would have been the base rent had the AAAF been used all along. The use of the depressed base rent in calculating future rent adjustments means that those adjustments will necessarily be lower than they would otherwise have been. Insofar as it authorizes the use comparability studies, § 801 deprives them of their right to have the adjustments calculated according to a formula, as provided in the HAP contracts. Plaintiffs are seeking declaratory relief that such a deprivation is unconstitutional, and there is no need to wait until the precise amount of the loss can be calculated before granting such relief. *See Alpine Ridge*, *supra*, at 7. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190, 201 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). *Pennell v. City of San Jose*, 485 U.S. 1 (1988), cited by defendant, is inapposite. The Court in *Pennell* held that a challenge to a tenant hardship provision of a San Jose rent control statute was premature where the provision gave the Hearing Officer absolute control over when and whether to apply the provision and there was no evidence that the clause had ever been

applied. In contrast with the *Acacia Villa* plaintiffs, plaintiffs in *Pennell* failed to show that injury was "certainly impending."

D. *Constitutionality of § 801*

1. *Property Right*

The threshold question for the due process claim is whether plaintiffs' contractual right to the AAAF adjustments is "property" that is protected by the Constitution. The Court holds that it is. *See Lynch v. United States*, 292 U.S. 571, 579 (1934) (renewable term insurance policies issued under the War Risk Insurance Act are property within the meaning of the Fifth Amendment, and provision of the Economy Act cancelling them is unconstitutional); *Perry v. United States*, 294 U.S. 330 (1935) (legislation abrogating federal government's obligation to pay principal and interest on certain bonds in gold coin found unconstitutional).

Defendants argue that *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986), is indistinguishable from this case and requires summary judgment in their favor. The Supreme Court in *Bowen* upheld the constitutionality of the Social Security Amendments of 1983. Those amendments took away the right of states to withdraw state and local government employees from the Social Security System. The right to terminate was expressly given in the contracts made pursuant to § 418, which authorized the voluntary participation of states in the Social Security System. In the mid-1970s, an alarming number of state entities began to terminate coverage. Congress concluded that these

withdrawals threatened the integrity of the Social Security System. Congress therefore amended § 418 to eliminate the right of withdrawal.

Congress had expressly reserved, in the statute, a right to "repeal, alter, or amend" the act at any time. The Court held that the effect of the reservation was to put the states on notice that "Congress retained the power to amend the law under which the Agreement was executed and by amending that law, to alter the Agreement itself." 477 U.S. at 54. The Court observed that the § 418 Agreement provided that its terms were "in conformity with" § 418, and that § 418 was "fully subject" to Congress' reserved power of amendment. *Id.* The Court recognized that Congress' reserved power does not permit it to repudiate its own debts, which constitute "property" of the lender, "in order to save money." *Id.* at 55.

The *Bowen* Court found that the contractual right to the termination clause was not properly within the meaning of the 5th Amendment. The Court noted that the termination language in the agreements tracked the language of that section, conferring no right beyond that contained in § 418 itself. *Id.* The Court distinguished *Perry*, noting that the provision did not constitute a debt of the United States, and *Lynch*, on the ground that it was not an "obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium." *Id.* The court also considered significant the fact that clause was not unique to the agreement or a term over which the states had bargaining power. *Id.*

Acacia Villa falls into the category of cases that the *Bowen* Court was careful to distinguish. *Alpine Ridge*, *supra*, at 14. The plaintiffs' contracts are not gratuities; rather, they are bargained-for agreements, for which plaintiffs paid valuable consideration—they have built and maintained low-income housing in accordance with HUD's requirements. The contracts stated that they were backed by the "full faith and credit" of the United States. They are obligations of the United States, similar to those created in *Perry* and *Lynch*. Unlike the contracts in *Bowen*, the contract language here does not mirror the statute and was given a different construction from the statutory language. The HAP contracts, as interpreted in *Rainier*, give plaintiffs rights beyond the provisions of the authorizing legislation—they give plaintiffs a right to the calculation of rent adjustments according to the AAAF formula even though the authorizing legislation gave them no such right.

HUD argues that principles of sovereignty and interpretation of contracts require the Court to conclude that the HAP contracts never gave plaintiffs a right to AAAF payments. HUD is correct that Congress' failure to reserve the right to amend the Section 8 program does not preclude it from subsequently amending it. *Bowen* made it clear that the absence of an express statement of right to amend does not constitute a waiver. The "sovereign's power to enact subsequent legislation affecting its own contractual arrangements endures, albeit with some limitations, unless 'surrendered in unmistakable terms.'" *Peterson v. U.S. Dept. of Interior*, 899 F.2d 799, 808 (9th Cir. 1990) quoting *Bowen*, *supra*, 477 U.S. at 52. The Ninth Circuit in *Peterson* held that where there is no express reservation, a court must examine the contracts made pursuant to the statute to see whether Congress "surrendered in clear and absolute language" the right to amend. *Id.*

Two central principles govern the interpretation of government contracts. First, government contracts

should be construed, wherever possible to avoid foreclosing the exercise of sovereign power. *Bowen*, 477 U.S. at 52. Second, such contracts should be construed consistently with the legislative scheme that authorized them. *F.H.A. v. The Darlington*, 385 U.S. 84, 87-88 (1958).

Darlington involved a corporation that obtained federally subsidized mortgage insurance provided under § 608 of the National Housing Act in 1949. The statute was enacted to provide housing for World War II veterans and their families. The contract had no explicit provision with respect to the right to rent to transients. In 1954, Congress enacted legislation providing that § 608 was intended to exclude transients while the mortgage remained outstanding. The Court stated that while subsequent legislation is "not conclusive in determining what the previous Congress meant . . . [it] is entitled to weight when it comes to the problem of construction." *Id.* at 90. Taking into account the subsequent legislation, as well the language of the original statute and accompanying regulations, the court concluded that the statute in fact intended to exclude transients, and that the contracts, absent controlling language, should be read consistently with that intent. *Id.*

The Ninth Circuit in *Peterson* applied the principles propounded in *Bowen* and *Darlington* to water contracts authorized under the Reclamation Act. Under those contracts, between the Department of Interior's Bureau of Reclamation and public water agencies in California, the federal government agreed to provide water to those districts at a subsidized rate. The court found that among the purposes of the Reclamation Act were the creation of family-sized farms and wide distribution of the water subsidy. To

further those goals, Congress excluded from the subsidy tracts of more than 160 acres in the possession of a single owner. The Court concluded that the contracts did not contain an implied right to provide water to leased land, where such an implied right would allow the water districts to undermine the 160 acre limitation contrary to the purpose of the authorizing legislation. *Peterson*, 899 F.2d 799.

HUD argues that if this court applies the analysis of *Darlington* and *Peterson* to the instant case, it will be required to conclude that the HAP contracts never gave plaintiffs a right to the AAAF payments. In effect, HUD is arguing that *Rainier* was wrongly decided and that § 801 is evidence of earlier Congressional intent with respect to that issue. The Court disagrees.

The *Rainier* decision acknowledges that the Housing Act upon which the HAP contracts are based gave HUD the option of making rent adjustments according to comparability studies. It holds, nevertheless, that the HAP contracts *explicitly* chose the AAAF formulation. 848 F.2d at 991. The courts in *Darlington* and *Peterson*, in contrast, simply refused to interpret the contracts as containing *implied* provisions that would foreclose the exercise of sovereign power. This Court is bound by the Ninth Circuit's construction.

2. *Due Process Analysis*

Having established that there is a property right in issue, the next step in the analysis is to decide what level of scrutiny to apply to § 801. Defendants argue that these claims are subject to rational basis review, just as any other economic legislation would be. Plain-

tiffs contend that § 801 is subject to heightened scrutiny. To the extent that plaintiffs' argument is based upon analogies to the Contract Clause, it must fail. The standard applicable to states under the Contract Clause is not the same as the standard applicable to the United States under the Due Process Clause. *See, e.g., Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984). On the other hand, the Supreme Court in *United States Trust Company v. New Jersey*, noted in dicta that *Perry* and *Lynch* applied a "dual standard of review" under the Due Process Clause, with heightened scrutiny applied where the federal government is charged with impairing its own obligations. 431 U.S. 1, 25 n.25 (1977).

With the exception of *Orrego*, *supra*, courts faced with a challenge to legislation that abrogates a private party's vested rights under a federal government contract have not explicitly adopted either a heightened or rational basis level of scrutiny. *See Lynch*, *supra*, 292 U.S. at 580; *Perry*, *supra*, 294 U.S. at 350-51; *Larionoff*, *supra*, 533 F.2d at 1180; *Alpine Ridge*, *supra*, at 15. Most courts have not even addressed the question of what level of scrutiny applies. *See Lynch*, *supra* 292 U.S. at 580; *Perry*, *supra*, 294 U.S. at 350-51; *Larionoff*, *supra*, 533 F.2d at 1180.

These courts have recognized, however, that where the federal government enacts legislation that impairs its own contracts with private parties simply to save money, such legislation is treated differently than economic legislation that might incidentally affect the rights of parties to private contracts. *See Lynch*, *supra*, 292 U.S. at 580 (even in the face of the Great Depression, Congress was "without power to reduce expenditures by abrogating contractual obligations."); *Perry*, *supra*, 294 U.S. at 350-51 ("Congress is authorized to pledge [the] credit [of the United States] as an assurance of payment as stipulated. . . . To say that Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise . . .). Although *Perry* and *Lynch* are Lochner Era cases, they are still cited for the proposition that saving money is not sufficient justification for legislation that impairs federal obligations. *See e.g., Bowen*, *supra*, 477 U.S. at 41 ("Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money," citing *Perry* and *Lynch*); *United States Trust Company v. New Jersey*, 431 U.S. 1, 26 n.25 (1977); *Larionoff*, *supra*, 533 F.2d 1167, 1180. *Orrego*, which *explicitly* adopts a rational basis test, acknowledges that even under that test, to the extent that *Perry* and *Lynch* still have force, the court has a "limited role under [those cases] . . . to see whether Congress acted solely to relieve a debt in the face of a private party's vested rights." 710 F. Supp. at 1396.

The implication of *Orrego* is that saving money is not a legitimate purpose under any test. *Perry*, *Lynch*, and *Larionoff* could be read consistently with that analysis or instead, as having adopted a heightened level of scrutiny, as the *U.S. Trust* dicta suggests. But the court shares Judge Rothstein's view in *Alpine Ridge* that under either analysis, it is clear that § 801 must fall if it serves no other purpose than to save money. *Alpine Ridge*, *supra*, at 15.

The government offers four justifications for § 801 which it attempts to distinguish from saving money: first, avoiding excessive rents and rates of return for Section 8 projects; second, ensuring project owners a

reasonable rate of return; third, remedying the inconsistent application of comparability studies; and finally, resolving disputes over the use of comparability studies to adjust Section 8 rents.

The *Orrego* court appears to have accepted the alternative justification proffered by the government without further inquiry while the *Larionoff* court looked at the legislative history of the relevant statute to determine whether the justification advanced by the government was its actual purpose. *Orrego*, *supra*, 710 F. Supp. at 1396; *Larionoff*, *supra*, 533 F.2d at 1180. While the Court believes that the *Larionoff* court's approach is more appropriate, reference to legislative history is not essential here. HUD's justifications, on their face, do not add to plaintiff's characterization of the legislation as an effort to 'fix' the *Rainier* decision and save the government hundreds of millions of dollars. The Court agrees with Judge Rothstein's analysis of those justifications in *Alpine Ridge*, *supra*, at 16-17. The first and second justifications—avoiding excessive rates of return and ensuring a reasonable rate of return—are merely restatements of the money-saving purpose. Since the government bears the burden if the rate of return is excessive, keeping the rate of return down is about saving the government money. Phrasing these rationales in terms of rate of return to the owner rather than expenditure by the government does not change that fact. To the extent that the goal of a "reasonable" rate of return is viewed not as a limit on return but as a protection for the owners, that need is created by § 801 itself. Nor does the third justification have any substance. In the absence of § 801, the application of those studies is a

violation of plaintiffs' contractual rights. The government cannot justify application of the studies on the ground that it seeks to apply them more equitably where the government had no right to apply them at all. The fourth justification, the resolution of the dispute, is little more than bootstrapping. The dispute is about the fact that the contracts have been interpreted adversely to the government by the Ninth Circuit; the government now wants to avoid paying the project owners the amount that the contracts, as so interpreted, require. Again, the government is only concerned with dollars.

The conclusion that these justifications are illusory is consistent with the legislative history of § 801. As Senator Sasser stated, the rationale for § 801 was that:

> [B]y moving quickly to enact this legislation with its Ranier[sic] View 'fix,' we could save the Government hundreds of millions, if not more than a billion dollars. As we all know, at a time when budget dollars for housing are at a premium, we can scarcely afford to spend $1 billion to correct past HUD errors in the administration of its programs.

135 Cong. Rec. S16607 (daily ed. Nov. 21, 1989) (statement of Senator Sasser).

The Court recognizes that the result it reaches is contrary to the general approach that has been taken under the Due Process Clause as applied to economic legislation, but this is not ordinary economic legislation. It is, rather, legislation that deprives private individuals of vested contractual rights against the government, without serving some regulatory or social purpose beyond saving money. The government

may not renege on its obligations simply because, in retrospect, it finds those obligations too expensive.

3. *The "Questioning of the Public Debt" Claim*

Plaintiffs' final claim is based upon Section Four of the Fourteenth Amendment, which provides that "[t]he validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection and rebellion, shall be questioned." U.S. Const. amend. XII, § 4. Neither party gives this claim much attention, and there is a dearth of case law interpreting this provision. Since the Court has already concluded that § 801 violates due process, the Court does not reach this issue.

III. *Conclusion*

This Court is bound by the Ninth Circuit's construction of the HAP contracts in *Rainier View*. HUD's failure to calculate the rent adjustments according to the AAAF formula is a breach of those contracts. The Court concludes that § 801 is unconstitutional in that it deprives plaintiffs of their property right to rent adjustments as provided in the HAP contracts without due process. Since § 801 is unconstitutional, it affords no defense to the breach of contract claim.

Therefore, plaintiffs' Motions for Partial Summary Judgment on Counts I and X are granted. Defendants' Motion for Summary Judgment is denied.
Dated: October 31, 1990

/s/ Mariana R. Pfaelzer
MARIANA R. PFAELZER
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 90-0390 MRP (Sx)

ACACIA VILLA, A California General Partnership, ET AL., PLAINTIFFS

v.

JACK KEMP, ET AL., DEFENDANTS

FINAL JUDGMENT PURSUANT
TO FED. R. CIV. P. 54(b)

[Filed Oct. 31, 1990]

Plaintiffs' motions for partial summary judgment on Counts and I and X of the First Amended Complaint herein having come on for hearing before this Court on September 27, 1990, the Court having granted these motions for the reasons more particularly set forth in the accompanying Memorandum of Decision, plaintiffs having applied to the Court for entry of final judgment on Counts I and X pursuant to Fed. R. Civ. P. 54(b), and the Court having read and considered the entire record on this matter and the arguments of both parties with respect hereto;

NOW, THEREFORE, IT IS HEREBY ORDERED:

(1) The Court finds and determines that there is no just reason for delay in the entry of final judgment on Counts I and X of the First Amended Complaint and that more than one claim for relief is presented in the action; and

(2) The Court hereby directs the Clerk of the Court to enter final judgment forthwith for plaintiffs on Counts I and X of the First Amended Complaint as follows:

(a) Declaring that Plaintiffs' Housing Assistance Payments contracts ("HAP Contracts") with the United States Department of Housing and Urban Development ("HUD") require HUD to determine maximum rents each year by applying the Automatic Annual Adjustment Factor ("AAAF") published in the *Federal Register* and that HUD's use of "comparability studies" to determine maximum rents for plaintiffs' Section 8 projects is a breach of HUD's obligation to determine maximum rents each year according to the AAAFs;

(b) Declaring that Section 801 of the HUD Reform Act of 1989 is null and void because it violates the Constitution of the United States as more particularly discussed in the accompanying Memorandum of decision; and

(c) Declaring that from the date of this Judgment HUD is obligated to pay to plaintiffs future rent increases under plaintiffs' HAP Contracts determined by applying the AAAF to the Contract Rent which would be in force as of the date of the Judgment if HUD had applied the AAAF factors in the past without comparability studies.

DATED: This 31 day of October, 1990.

/s/ Mariana R. Pfalzer
United States District Judge

PRESENTED BY:

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON

By /s/ Molly Munger
MOLLY MUNGER

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-35267

D.C. No. CV-89-01654-BJR

ALPINE RIDGE GROUP, a partnership; MONROE ASSOCIATES, a limited partnership; BRENTWOOD, a limited partnership; CAMPBELL COURTS ASSOCIATES, a partnership; CHENEY GARDENS LIMITED PARTNERSHIP, a limited partnership, ET AL., PLAINTIFFS-APPELLEES

and

BITTERROOT MANOR, a limited partnership, ET AL., PLAINTIFFS-INTERVENORS

-vs-

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Urban Development; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS-APPELLANTS

No. 91-35573

ALPINE RIDGE GROUP, a partnership; MONROE ASSOCIATES, a limited partnership; BRENTWOOD, a limited partnership; CAMPBELL COURTS ASSOCIATES, a partnership; CHENEY GARDENS LIMITED PARTNERSHIP, a limited partnership, ET AL., PLAINTIFFS-APPELLEES

-vs-

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Urban Development; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Western District of Washington

No. 91-55354

D.C. No. CV-90-0390-MRP

ACACIA VILLA; ALICIA PARK APARTMENTS; AMERIGE VILLA; ANTELOPE VALLEY, ET AL., PLAINTIFFS-APPELLEES

-vs-

JACK KEMP, Sec. HUD; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California

ORDER DENYING REHEARING

[Filed May 29, 1992]

Before: WALLACE, Chief Judge, HUG and
RYMER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX H

TITLE VIII—SECTION 8 RENT ADJUSTMENTS

SEC. 801. ANNUAL ADJUSTMENT FACTORS FOR SECTION 8 RENTS.

(a) EFFECT OF PRIOR COMPARABILITY STUDIES.—

(1) IN GENERAL.—In any case in which, in implementing section 8(c)(2) of the United States Housing Act of 1937—

(A) the use of comparability studies by the Secretary of Housing and Urban Development or the appropriate State agency as an independent limitation on the amount of rental adjustments resulting from the application of an annual adjustment factor under such section has resulted in the reduction of the maximum monthly rent for units covered by the contract or the failure to increase such contract rent to the full amount otherwise permitted under the annual adjustment factor, or

(B) an assistance contract requires a project owner to make a request before becoming eligible for a rent adjustment under the annual adjustment factor and the project owner certifies that such a request was not made because of anticipated negative adjustment to the project rents.

for fiscal year 1980, and annually thereafter until regulations implementing this section take effect, rental adjustments shall be calculated as an amount equal to the annual adjustment factor multiplied by a figure equal to the contract rent

minus the amount of contract rent attributable to debt service. Upon the request of the project owner, the Secretary shall pay to the project owner the amount, if any, by which the total rental adjustment calculated under the preceding sentence exceeds the total adjustments the Secretary or appropriate State agency actually approved, except that solely for purposes of calculating retroactive payments under this subsection, in no event shall any project owner be paid an amount less than 30 percent of a figure equal to the aggregate of the annual adjustment factor multiplied by the full contract rent for each year on or after fiscal year 1980, minus the sum of the rental payments the Secretary or appropriate State agency actually approved for those years. The method provided by this subsection shall be the exclusive method by which retroactive payments, whether or not requested, may be made for projects subject to this subsection for the period from fiscal year 1980 until the regulations issued under subsection (e) take effect. For purposes of this paragraph, "debt service" shall include interest, principal, and mortgage insurance premium if any.

(2) APPLICABILITY.—

(A) IN GENERAL.—Subsection (a) shall apply with respect to any use of comparability studies referred to in such subsection occurring before the effective date of the regulations issued under subsection (e).

(B) FINAL LITIGATION.—Subsection (a) shall not apply to any project with respect to which litigation regarding the authority

of the Secretary to use comparability studies to limit rental adjustments under section 8(c)(2) of the United States Housing Act of 1937 has resulted in a judgment before the effective date of this Act that is final and not appealable (including any settlement agreement).

(b) 3-YEAR PAYMENTS.—The Secretary shall provide the amounts under subsection (a) over the 3-year period beginning on the effective date of the regulations issued under subsection (e). The Secretary shall provide the payments authorized under subsection (a) only to the extent approved in subsequent appropriations Acts. There are authorized to be appropriated such sums as may be necessary for this purpose.

(c) COMPARABILITY STUDIES.—Section 8(c)(2)(C) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)(2)(C)) is amended by inserting after the period at the end of the first sentence the following: "In implementing the limitation established under the preceding sentence, the Secretary shall establish regulations for conducting comparability studies for projects where the Secretary has reason to believe that the application of the formula adjustments under subparagraph (A) would result in such material differences. The Secretary shall conduct such studies upon the request of any owner of any project, or as the Secretary determines to be appropriate by establishing, to the extent practicable, a modified annual adjustment factor for such market area, as the Secretary shall designate, that is geographically smaller than the applicable housing area used for the establishment of the annual adjustment factor under sub-

paragraph (A). The Secretary shall establish such modified annual adjustment factor on the basis of the results of a study conducted by the Secretary of the rents charged, and any change in such rents over the previous year, for assisted units and unassisted units of similar quality, type, and age in the smaller market area. Where the Secretary determines that such modified annual adjustment factor cannot be established or that such factor when applied to a particular project would result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, the Secretary may apply an alternative methodology for conducting comparability studies in order to establish rents that are not materially different from rents charged for comparable unassisted units."

(d) DETERMINATION OF CONTRACT RENT.—(1) The Secretary shall upon the request of the project owner, make a one-time determination of the contract rent for each project owner referred to in subsection (a). The contract rent shall be the greater of the contract rent—

(A) currently approved by the Secretary under section 8(c)(2) of the United States Housing Act of 1937, or

(B) calculated in accordance with the first sentence of subsection (a)(1).

(2) All adjustments in contract rents under section 8(c)(2) of the United States Housing Act of 1937, including adjustments involving projects referred to in subsection (a), that occur beginning with the first anniversary date of the contract after the regulations issued under subsection (e) take effect

shall be made in accordance with the annual adjustment and comparability provisions of sections 8(c)(2)(A) and 8(c)(2)(C) of such Act, respectively, using the one-time contract rent determination under paragraph (1).

(e) REGULATIONS.—The Secretary shall issue regulations to carry out this section and the amendments made by this section, including the amendments made by subsection (c) with regard to annual adjustment factors and comparability studies. The Secretary shall issue such regulations not later than the expiration of the 180-day period beginning on the date of the enactment of this Act.

(f) REPORT.—Not later than March 1, 1990, the Secretary shall report to the Congress on the feasibility and desirability, and the budgetary, legal, and administrative aspects, of adjusting contract rents under section 8(c)(2)(C) of the United States Housing Act of 1937 on the basis of any alternative methodologies that are simpler in application than individual project comparability studies.

(g) TECHNICAL AMENDMENT.—The first sentence of section 8(c)(2)(C) of the United States Housing Act of 1937 is amended by inserting ",type," after "quality".

Approved December 15, 1989.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 80034